No. 143

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 37, ET AL.,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 195

INTERNATIONAL LONGSHOREMEN'S AND WAREMEN'S UNION, LOCAL 37, A VOLUNTARY ASSOCIATION; CHRIST MENSALVAS, ERMESTO MANGAOANG, PEDRO BONILLA, ELMER LITTLE, AND SILVINO TALLIDO, *Appellants,*

vs.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, petitioners-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the three-judge district court entered in this cause.

Opinion Below

The opinion of the district court for the Western District of Washington, Northern Division, is reported in 111 F. Supp. (Adv. Op.) 802; a copy of the opinion is attached hereto as Appendix A.

Jurisdiction

The opinion of the district court was filed on April 10, 1953. Motion for Rehearing was timely filed on April 20, 1953. The court's order denying the motion for rehearing was entered on April 22, 1952. A petition for appeal is presented to the district court herewith, to-wit, on June 22nd, 1953. The jurisdiction of the Supreme Court to review this cause by direct appeal is conferred by Title 28, United States Code, §§ 1253 and 2101(b).

The following cases sustain the jurisdiction of the Supreme Court to review the decision of a three-judge district court denying an injunction against the enforcement of a federal statute: *Stafford* v. *Wallace* (1922), 258 U. S. 495; *Radio Corp. of America* v. *United States* (1951), 341 U. S. 412. Direct review lies when the injunction is sought only against one particular application of a statute; *Fleming* v. *Rhodes* (1947), 331 U. S. 100 (involving a state statute).

Questions Presented

The basic issues presented by this appeal are whether Congress intended, and, if so, whether constitutional sanction exists to exclude non-citizens who seek to enter the continental United States under the following circumstances: Non-citizens, lawfully admitted to the continental United States for permanent residence, returning from temporary residence in Alaska, in pursuance of their seasonal employment contracts.

These issues are presented by the five assignments of error by the appellants, in which it is urged that the district court erred, as follows:

> 1. In holding that paragraph (7) of § 212(d) of the Immigration and Nationality Act of 1952 applies to lawful permanent residents of the continental United States who travel to Alaska from Seattle and who seek

to return therefrom to the continental United States at Seattle.

2. In holding that Congress has the power to classify Alaska as a foreign territory for the purpose of exclusion.

3. In holding that aliens who are lawful permanent residents of the United States may be constitutionally excluded pursuant to the provisions of paragraph (7) of § 212(d) of the Immigration and Nationality Act of 1952.

4. In denying petitioners an injunction restraining the respondent, John P. Boyd, District Director, Immigration and Naturalization Service, from enforcing the provisions of paragraph (7) of § 212(d) of the Immigration and Nationality Act of 1952 as applicable to petitioners, and those they represent.

5. In denying petitioners' motion for rehearing and reconsideration of its denial to grant the above-mentioned injunction.

Statute Involved

The statute involved in this appeal is paragraph (7) of § 212(d) of the Immigration and Nationality Act of 1952, 66 Stat. 182, Title 8, USCA (1952 Supp.) § 1182(d)(7). The paragraph provides as follows:

"(7) The provisions of subsection (a) of this section, except paragraphs (20), (21), and (26), of said subsection shall be applicable to any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States: *Provided*, That persons who were admitted to Hawaii under the last sentence of § 8(a)(1) of the Act of March 24, 1934, as amended (48 Stat. 456), and aliens who were admitted to Hawaii as nationals of the United States shall not be excepted by this paragraph from the application of paragraphs (20) and (21) of subsection (a) of this section, unless they belong to a class de-

cared to be nonquota immigrants under the provisions of § 1101(a)(27) of this title, other than subparagraph (c) thereof, or unless they were admitted to Hawaii with an immigration visa. The Attorney General shall by regulations provide a method and procedure for the temporary admission to the United States of the aliens described in this proviso. Any alien described in this paragraph, who is excluded from admission to the United States, shall be immediately deported in the manner provided by § 1227(a) of this title."

Statement

Petitioners-appellants are non-citizens who have been lawfully admitted for permanent residence to the continental United States, and who are members of the International Longshoremen's and Warehousemen's Union, Local 37, a voluntary association which bargains collectively for jobs and job opportunities in the Alaska herring and salmon canning industries. The said Union consists of a membership of over 3,000 persons, the overwhelming majority of whom are non-citizens, and who are engaged in seasonal agricultural work in the west coast states, during the fall and winter months, and who then travel to Alaska during the summer months to man the herring and salmon canneries. This employment in Alaska is a substantial and essential portion of each individual petitioner's yearly income.

The respondent-appellee, John P. Boyd, District Director Immigration and Naturalization Service, for District 11 (comprising Washington, Oregon, and Alaska), announced that the above specified provision of paragraph (7) of § 212(d) of the Immigration and Nationality Act of 1952 would apply to all non-citizens who leave the continental United States to work in Alaska and then immediately return to the continental United States; that is, they would

be subject to the exclusion provisions of the 1952 Act, although in fact, none would ever leave the territory of the United States except in transit on United States transport facilities.

The petitioners-appellants sought an injunction against the enforcement of the above specified provisions on the ground that such application would be, and is, unconstitutional, and, further, that Congress did not intend such application.

The original petition and return, and the amendments to the petition and return were superseded by the court's pre-trial order encompassing the agreed facts and issues of law. No testimony was taken at the trial. Respondent's Exhibit A and petitioners' Exhibits B through C documented by the pre-trial order by showing that respondent-appellant intended to apply the provisions of paragraph (7) of § 212(d) of the 1952 Act to the petitioners-appellants upon their return from Alaska; petitioners' Exhibit A documented the pre-trial order by showing that the petitioners-appellants enjoyed various contract and property rights which would be jeopardized and denied them if they were not able to return from Alaska. Since these exhibits do no more than document the agreed facts set forth in the pre-trial order, they are not designated as part of the record on appeal.

The case was argued orally before the three-judge district court on April 6, 1953, and the court filed its opinion on April 10, 1953, holding that Congress did intend the exclusion provisions of the Act to be applied to petitioners-appellants and that such application was not unconstitutional. A motion for rehearing was timely filed on April 20, 1953; said moiton for rehearing was denied by the court's order, dated April 21, and entered the following day, April 22, 1953.

The Questions Are Substantial

1. Congress Cannot Constitutionally Provide For Exclusion of Lawful Permanent Residents Who Leave The Continental United States, Travel to Other Territory of the United States and Seek to Return to the United States

The constitutional issues presented by the within cause are closely analogous to those which the Supreme Court recently expressly left undecided in the case of *Kwong Hai Chew* v. *Colding* (1953), 344 U. S. 590. In the *Chew* case the court indicated that the secrecy-security exclusion hearings (now provided for in § 235 of the 1952 Act) were not intended to apply, and could not constitutionally be applied, to the petitioner who was an alien seaman returning from a foreign voyage to his home port in New York, where he had previously enjoyed the status of a permanent resident of the United States. The Supreme Court said, at 600:

> "We do not regard the constitutional status which petitioner indisputably enjoyed prior to his voyage as terminated by that voyage. From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien, and we do not now reach the question whether he is to be so treated."

The court further said, at 601:

> "While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration by statute or authorized regulation because of a voyage undertaken by him to foreign ports, it does not follow that he is thereby deprived of his constitutional right to procedural due process."

The facts presented in this case are even stronger than those presented in the *Chew* case, for the petitioners-appel-

lants herein are permanent residents who seek to return to the mainland from a territory of the United States, rather than permanent residents who seek to return to the United States after trips to foreign countries.

The district court stated:

> "We are not dealing here with due process of law, but rather with the power of Congress to fix or circumscribe the status of certain aliens who leave a territory of the United States to enter continental United States or other places under the jurisdiction of the United States."

This argument completely ignores the fact that the petitioners-appellants are lawful permanent residents who are being threatened with *exclusion* although they will never have left the United States. They are entitled to the protection of due process of law as permanent residents: *Bridges* v. *Wixon* (1945) 326 US 135; *Kwong Hai Chew* v. *Colding* (1953) 344 US 590.

Petitioners-appellants are not contending that they cannot be expelled, which was erroneously implied by the district court in its opinion. They are insisting, however, that before they may be deprived of their status as permanent residents they must be expelled, pursuant to the expulsion process, and not the perfunctory hearing (and incarceration which they will necessarily suffer) if they are excluded upon their return from Alaska. Being lawful permanent residents who never leave the United States, there is no rational basis upon which Congress can justify providing for their exclusion.

The district court reached its decision without discussing, or even citing, the decision of the Supreme Court in *Kwong Hai Chew* v. *Colding*, supra, although in that case the Supreme Court based its decision on the precise fact that as a lawful *permanent resident* certain exclusion processes

could not be applied to the petitioner Chew. The Court also indicated that it was doubtful whether he could be excluded at all. Despite this decision, however, the district court in its opinion states:

> "The exclusion procedure outlined in Sections 235 and 236 of the Act would be applicable to such aliens."

Yet § 235 includes the very proceedings that the Supreme Court held could not be applied in the *Chew* case.

Petitioners-appellants respectfully urge that the district court has erroneously misinterpreted and misapprehended (or ignored) the import of the *Chew* case.

The importance of this issue is patent, for the volume of travel of lawful permanent residents to and from the territories and insular possessions of the United States is a substantial proportion of the total travel between said territories and the United States. The effect is particularly important as regards travel to and from Alaska, since a substantial proportion of the men and women who work in the seasonal fishing industries in the territory and waters of Alaska are persons of foreign birth. These persons, including petitioners-appellants herein, are placed in the position of deciding to continue to exercise their employment rights in Alaska and thereby be subjecting themselves to exclusion and all of the corollary sanctions involved in such a proceeding [See *U.S. ex rel Knauff* v. *Shaughnessy* (1950) 338 US 537], or forego and abandon all of their seniority and job rights in Alaska.

2. Congress Did Not Intend To Provide For The Exclusion of Lawful Permanent Residents of the United States Who Travel to and Seek to Return From the Territories of the United States.

A second and subsidiary issue raised by petitioners-appellants below is that Congress did not intend the Act

to apply to persons in their position, but merely intended to extend the prior practice which governed aliens seeking to enter the continental United States for the first time. This question is also a substantial one.

The court below wholly misapprehended congressional intent when it interpreted paragraph (7) of subsection 212(d) of the Immigration and Nationality Act of 1952 as applying to petitioners-appellants.

Petitioners-appellants are all aliens who were lawfully admitted for permanent residence on the mainland. This admission was without qualification; they are, therefore, not now immigrants. Exclusion, however, applies only to immigrants: see *Lapina* v. *Williams* (1914) 232 US 78. Congress recognized this in its House Report #1365 (accompanying the House Version of the 1952 Act) at pages 36 to 37:

> "Aliens who meet the qualitative tests and are eligible for admission into the United States are classified under existing law as either immigrants or non-immigrants. The immigrant class includes those *aliens who seek to enter the United States for permanent residence* . . ." (Emphasis supplied)

Since all of the petitioners-appellants have, previously to the passage of the Act, been lawfully admitted for permanent residence, they are not immigrants within the meaning of § 212(d)(7) of the 1952 Act.

Congress also stated in House Report #1365, at page 53, and Senate Report #1072, at page 14, that:

> "Section 212(d)(7) of the bill continues in effect special procedures applicable to aliens who travel from the Panama Canal Zone, territories, or outlying possessions to the continental United States or any other territory under the jurisdiction of the United States. Under the bill, such procedures will also be applicable

to aliens traveling from Alaska to the continental United States."

The prior practice referred to by Congress was founded upon the distinction between an unqualified admission to the territories: *Healy* v. *Backus* (CA 9, 1915), 221 F. 358, *In re Singh* (MD Cal., 1913) 209 F. 700. These cases held that the alien who is admitted to the insular territories could be excluded upon seeking to enter the continental United States for the first time, precisely because his original entry to the islands was *qualified* and made subject to further exclusion before an unqualified admission for permanent residence in the continental United States could be effected.

Since petitioners-appellants have obtained a lawful, unqualified admission into continental United States for permanent residence, the Act does not apply to them.

The words "any alien" in paragraph (7) are followed by the words "who *shall leave Alaska . . . and who seek to enter.*" This modification clearly indicates a change of status from one who is resident in Alaska to one who is seeking permanent residence in the continental United States. Thus, when the court below stated: "The words 'any alien' include aliens situated as those here involved" it failed to read those words in their proper historical and textual context.

It is respectfully submitted that the decision of the three-judge district court fails to recognize and protect the status which the petitioners-appellants enjoy as lawful permanent residents, and that it erred in holding that Congress intended and can constitutionally provide that they may be excluded from the continental United States although they have never left the United States since their original admission to the continental United States for permanent residence.

We believe that the questions presented by this appeal are substantial, and that they present issues of great public importance.

Respectfully submitted,

NORMAN LEONARD,
Counsel for Appellants.

JOHN CAUGHLAN,
SIGFRIED HESSE,
of Counsel.

APPENDIX A

PER CURIAM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. 3384

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 37, a Voluntary Association, CHRIST MENSALVAS, ERNESTO MANGAOANG, PEDRO BONILLA, ELMER LITTLE, and SILVINO TALLIDO, *Petitioners*,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, *Respondent*

Per CURIAM:

This matter is now before us sitting as a statutory three-judge United States District Court convoked pursuant to the provisions of Section 2284, Title 28 U. S. C.

Petitioners seek an injunction against respondent's interpretation and enforcement of Section 212(d)(7) of the Immigration and Nationality Act of 1952 and a declaration of rights thereunder.

Jurisdiction of the controversy is asserted under Title 28 U. S. C., Section 1337, 2201 and 2282.

Under provision of a pretrial order and an amendment thereto entered prior to the hearing of the case all material factual issues were agreed upon and the pleadings passed out of the case.

At the hearing the parties offered no evidence apart from the exhibits identified in and attached to the pretrial order and agreed that the case as submitted presents only issues of law as set forth in the pretrial order.

The parties have agreed in the pretrial order and amendment thereto that the facts, so far as pertinent to the disposition of this case, are set forth in paragraphs II through IX of the "Admitted Facts" as follows:

"II

"The International Longshoremen's and Warehousemen's Union, Local 37, is a voluntary association of over

three thousand persons who work every summer in the herring and salmon canneries of Alaska.

"III

"Petitioners Mensalvas and Mangaong are the president and business agent of said union, respectively, and they, with the union, bring this action on behalf of all members of the union who are aliens and who are lawful permanent residents of the United States.

"IV

"Respondent is the District Director of the Immigration and Naturalization Service, Seattle, Washington, who is charged with the duty of enforcing all laws and regulations regarding immigration into the port of Seattle.

"V

"For many years there has been collective bargaining in the salmon and herring canning industry in Alaska and said union has been for many years a principal bargaining agent in said industries, these collective bargaining agreements governing the terms and conditions of employment and seniority of employment in the various salmon and herring canneries in Alaska.

"VI

"The members of said union collectively own its buildings, equipment and contract rights and enjoy further, because of their membership in said union, numerous other rights such as pensions and insurance.

"VII

"If the members of said union who are lawful permanent resident aliens are excluded upon their return to Seattle from Alaska after the 1953 canning season the above specified contract and property rights will be jeopardized and forfeited. The most recent collective bargaining contract of the union is attached to this order as Petitioners' Exhibit A.

"VIII

"The respondent has concluded that all members of said union who are lawful permanent residents of the United States and who go to Alaska from Seattle and return to the continental United States at Seattle will be subject to the provisions of section 212(a) of the Immigration and Nationality Act of 1952 as required by the language of section 212(d)(7) of said Act and pertinent regulations as interpreted by the respondent, John P. Boyd, who, as an enforcement officer, charged with the enforcement of the immigration laws and regulations, would act substantially in the following manner with respect to the enforcement of such laws and regulations:

"Upon the return of a lawful resident alien the respondent would direct Immigration officers to inspect such alien pursuant to the provisions of section 235 of the Act to determine whether said alien belongs to any of the classes enumerated in section 212(a) of said Act. If the examining officer determined that he did not come within the provisions of a class enumerated in section 212 of the Act, the lawful resident alien would be admitted but if, as provided by section 235(b), such alien did not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land, the said alien would be detained for further inquiry to be conducted by a Special Inquiry Officer. The Special Inquiry officer would then proceed in the manner provided by section 235(a), the alien having the right of counsel provided by section 292 of the Act, to determine whether such alien be allowed to enter or should be excluded and deported. If the decision of the Special Inquiry Officer is adverse, the alien would have the right of appeal to the Attorney General provided by section 236(b) of the Act. The Attorney General may in his discretion, as provided by section 212(c) of the Act, admit aliens lawfully admitted for permanent residence who temporarily proceed abroad and who are returning to a lawful, unrelinquished domicile of seven consecutive years without regard to the provisions of paragraphs 1 through 25 and paragraphs 30 and 31 of section 212(a). The decision of the Special Inquiry Officer would be final unless reversed

on appeal to the Attorney General. The alien would have the further right of collateral review by habeas corpus proceedings of the Attorney General's decision to determine whether or not the law had been correctly applied and he had been given a fair hearing consistent with the requirements of procedural due process.

"IX

"That Christ Mensalvas, Ernesto Mangaoang, Ponciano Torres, Ramon Tancioco, and Pedro Caborney are all members of the Union who were lawfully admitted to the United States as permanent residents; that respondent is presently seeking, by deportation proceedings to expel them; that an order or warrant of deportation has been issued in their cases; that administrative appeal and/or judicial review is presently being sought by them; that they all intend to travel to Alaska this summer in pursuance of their employment rights; and that this employment, pursuant to the contract rights specified above, constitutes the source of a substantial portion of their yearly income."

The issues of law as posed in the pretrial order are:

"1

"Does the Court have jurisdiction, in that, is there a present threat by the respondent, other than hypothetical, beyond that implied by the existence of the pertinent laws and regulations to a vested right or status of the petitioners which is entitled to protection against a cause of exclusion proscribed (prescribed) by Congress?

"II

"Whether paragraph (7) of section 212(d) of the Act applies to lawful permanent residents of the continental United States who travel to Alaska from Seattle and who seek to return therefrom to the continental United States at Seattle; or whether said section applies only to aliens not lawfully admitted to the United States seeking to enter the continental United States at Seattle from Alaska for the first time?

"III

"If the first interpretation is adopted, whether

(a) Congress has the power to classify Alaska as a foreign territory for the purpose of exclusion?

(b) Whether aliens who are lawful permanent residents of the United States may constitutionally be excluded pursuant to said section?"

It is clear that the issues of law here involved concern only aliens and not citizens of the United States by birth or naturalization.

Proceeding to the first issue of law, respondent contends that the court is without jurisdiction under Article III. Section 2 of the United States Constitution in that the case does not present a justiciable controversy. We do not agree. Borrowing the language of Circuit Judge Clark of the Second Circuit, there can be little question that a suit will lie against a defendant, or respondent such as here, for acting beyond his statutory authority; and the declaratory judgment, together with an enforcing injunction, furnishes a proper device to test the scope of this authority. See *U. S. Lines Co.* v. *Shaughnessy*, 195 F. 2d 385; *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 139-140, 71 S. Ct. 624, 95 L. Ed. 817 (and cases therein cited).

As to the second question, we think section 212(d)(7) of the Immigration and Nationality Act of 1952 does apply to lawfully admitted aliens who are permanent residents of the continental United States when returning from Alaska to continental United States at Seattle.

Section 212(a) of the Immigration and Nationality Act of 1952 in its opening paragraph provides:

> "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:"

Without question this language, when read with other provisions of the Act, must be interpreted to authorize respondent to exclude aliens such as petitioners if within any

of the classes thereafter referred to, in the event such aliens departed from the United States for a foreign land and sought return. The exclusion procedure outlined in Sections 235 and 236 of the Act would be applicable to such aliens. *Shaughnessy v. Mezei*, decided by the United States Supreme Court March 16, 1953.

The language of Section 212(d)(7) in plain and simple words makes Section 212(a) applicable "to *any alien* who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States." We cannot escape the obvious meaning of the language used. The words "any alien" included aliens situated as are those here involved. As stated by Judge Sugarman in *United States Lines Co. v. Shaughnessy*, 101 F. Supp. 61, at page 64 (affirmed 195 F. 2d 385):

> "In arriving at the intent of Congress, the courts are not to speculate as to the possible thoughts which might have been in the minds of the legislators when the statute was enacted. It is not for the court, acting upon conjecture and surmising what may have been the intent of the Congress, to interpolate exceptions in the statute, thus in effect avoiding and nullifying the express declaration of the act. On the contrary, the legislative intent is to be determined primarily from the language used in the act, read in connection with the canons of interpretation and surrounding circumstances. The language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction. Words of ordinary import receive their understood meaning, and technical terms are construed in their special sense. While the literal meaning of the statute may be avoided to effectuate the legislative intent, Congress is presumed to mean what it says, and if there is no ambiguity in the act, it is generally construed according to its plain terms."

The third and final dual question to decide, while posed in two parts, is actually one, namely, has Congress exceeded

its constitutional powers in enacting Section 212(d)(7) as this court has now interpreted said section. We think not. We are not dealing here with the question of due process of law but rather with the power of Congress to fix or circumscribe the status of certain aliens who leave a territory of the United States to enter continental United States.

The Supreme Court, in considering the rights of lawfully admitted aliens who were permanent residents of the continental United States, stated in *Harrisiades v. Shaughnessy*, 342 U. S. 580, page 586:

> "Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose."

The fact that an alien leaving a territory of the United States and seeking entry to continental United States may have been recently and for a long period of time theretofore been a lawfully admitted alien permanently residing in continental United States would not alter or restrict the power of the government to circumscribe his status as an alien.

Congress having the authority to legislate generally on the subject matter before us, in what respect, if any, has that authority here been violated? Congressional wisdom or purpose, as such, is not reviewable by the courts and has no place in the legal issue here involved. Keeping clearly in mind the vast and broad powers of Congress to enact legislation excluding or expelling aliens as balanced against the limited constitutional rights of all aliens, including lawfully admitted resident aliens of continental United States, we cannot hold that that portion of the statute under attack offends or is beyond the constitutional authority vested in Congress even though its provisions make applicable restrictions upon aliens leaving the territories of the United States, including Alaska, and entering or reentering other territories, states or places under United States juris-

diction when not applicable to aliens permanently resident in or traveling within or between the states. Neither are we aware of any constitutional limitation upon the power of Congress which would forbid its classification in the same category, for the purpose of exclusion, lawfully admitted aliens permanently residing in continental United States when seeking reentry into the states from a territory of the United States, and similarly situated aliens seeking reentry to the United States from a foreign land.

The relief sought by petitioners herein is denied and the action is hereby dismissed.

Dated April 10. 1953.

Homer T. Bone, United States Circuit Judge. John C. Bowen, United States District Judge. William J. Lindberg, United States District Judge.

(9362)

No. 195

Supreme Court of the United States

OCTOBER TERM, 1953

INTERNATIONAL LONGSHOREMENS' AND WAREHOUSEMENS' UNION, LOCAL 37, *et al.*,
Appellants,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, *Respondent.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLANTS

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THE ARGUS PRESS, SEATTLE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the District Court is reported at 111 F. Supp. 802.

JURISDICTION

The opinion of the three-judge District Court was rendered on April 10, 1953 (R. 7-14). Appellants' Motion for Rehearing was filed on April 20, 1953 (R. 14), and was denied on April 21, 1953 (R. 15). The Order Allowing Appeal was filed on June 22, 1953 (R. 17). The jurisdiction of this court to review the cause by appeal rests on 28 U.S.C. §§1253, 2101(b).

QUESTIONS PRESENTED

Whether Congress intended to provide, and may constitutionally so provide, for the exclusion of noncitizens lawfully admitted for permanent residence in the continental United States upon their return from Alaska, after traveling directly to and returning directly from there, in pursuance of their seasonal, contractual employment.

STATUTE INVOLVED

Paragraph (7) of subsection 212(d) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1182(d)(7), 66 Stat. 182, provides:

> "The provisions of subsection (a) of this section, except paragraphs (20), (21), and (26), of said subsection shall be applicable to any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States; *Provided,* That persons who were admitted to Hawaii under the last sentence of §8(a)(1) of the Act of March 24, 1934, as amended (48 Stat. 456), and aliens who were admitted to Hawaii as nationals of the United States shall not be excepted by this paragraph from the application of paragraphs (20) and (21) of subsection (a) of this section, unless they belong to a class declared to be nonquota immigrants under the provisions of §1101(a)(27) of this title, other than sub-paragraph (c) thereof, or unless they were admitted to Hawaii with an immigration visa. The Attorney General shall by regulations provide a method and procedure for the temporary admission to the United States of the aliens described in this proviso.

Any alien described in this paragraph, who is excluded from admission to the United States, shall be immediately deported in the manner provided by §1227(a) of this title."

STATEMENT

The individual appellants are non-citizens* who have been lawfully admitted for permanent residence to the continental United States, who are members of the appellant union, a voluntary association which bargains collectively for the jobs and job opportunities in the Alaska herring and salmon canning industries. The union consists of a membership of over 3,000 persons, the majority of whom are non-citizens engaged in seasonal agricultural work in the western states during the fall and winter months, who then travel to Alaska during the summer months to man the herring and salmon canneries (R. 1-2). This employment is a substantial and essential portion of each individual appellant's yearly income (R. 6).

The respondent John P. Boyd, District Director, Immigration and Naturalization Service, for District 11 (including Washington and Alaska) announced that paragraph (7) of subsection 212(d) of the Immigration and Nationality Act of 1952 would subject all non-citi-

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*Doubt remains as to the status of Filipinos, such as appellant Mangaoang, who came to this country for permanent residence as nationals, prior to the effective date of the Philippine Independence Act, 48 Stat. 456, despite the cases of *Cabebe v. Acheson,* (CA 9) 183 F.(2d) 795; and *Mangaoang v. Boyd,* (CA 9) 205 F.(2d) 553. Cf. Brief in Opposition, *Mangaoang v. Boyd,* No. 345, October Term, 1953. The petition for *certiorari* was denied: 346 U.S. ....., 98 L.Ed. 65.

zens who leave the continental United States to work in Alaska to the exclusion provisions of the Act upon their return to Seattle despite the fact that they never leave the territory of the United States (R. 2-3).

The appellants sought an injunction and declaration of rights on the grounds that Congress did not intend such an application of the Act, and, if it did, such an application is unconstitutional.

The case was argued before a three-judge district court on April 6, 1953, and on April 10, 1953, said court filed its opinion holding that Congress intended, and had the constitutional power, to subject persons situated as the individual appellants to the exclusion provisions of the Act. The court's order denying appellants' motion for rehearing was entered on April 22, 1953. The order allowing appeal was entered on June 22, 1953.

SPECIFICATIONS OF ERROR

The District Court erred:

1. In holding that paragraph (7) of §212(d) of the Immigration and Nationality Act of 1952 applies to lawful permanent residents of the continental United States who travel to Alaska from Seattle and who seek to return therefrom to the continental United States at Seattle.

2. In holding that Congress has the power to classify Alaska as a foreign territory for the purpose of exclusion.

3. In holding that aliens who are lawful permanent residents of the United States, and who never leave the

territory of the United States, may be constitutionally excluded pursuant to the provisions of paragraph (7) of §212(d) of the Immigration and Nationality Act of 1952.

4. In denying appellants an injunction restraining the respondent, John P. Boyd, District Director, Immigration and Naturalization Service, from enforcing the provisions of paragraph (7) of §212(d) of the Immigration and Nationality Act of 1952 as applicable to appellants, and those they represent, and the declaration of rights prayed for.

5. In denying appellants' motion for rehearing and reconsideration.

SUMMARY OF ARGUMENT

Although there are individual appellants before the court whose appeals must be heard, the appellant union likewise has standing to be heard since the ultimate effect of the possible exclusion of its membership who are non-citizens presents a serious threat to its ability to meet its contract obligations as a principal bargaining agent for jobs in the Alaska herring and salmon canneries. Moreover, it is the most practical party to fully adjudicate the impact of the provisions of subsection 212(d)(7) upon its membership.

The district court misconstrued congressional intent when it held that subsection 212(d)(7) subjected non-citizens who are lawfully admitted to the continental United States for permanent residence to the exclusion process upon their return from Alaska. The subsection properly and consistently interpreted provides

only for the potential exclusion of non-citizens who seek to enter the continental United States *through* the territories. Since 1913, admittance to the territories is only conditional, not unqualified; *Healy v. Backus* (CA 9) 221 Fed. 358. The instant case, however, involves the status of persons who have been unqualifiedly admitted to the United States, and who have not, since that admittance, left the jurisdiction of the United States.

In any event, if Congress did intend to subject persons admitted unqualifiedly into the United States to the exclusion process, then subsection 212(d)(7) is unconstitutional. Once admitted unqualifiedly, non-citizens enjoy the status of persons entitled to the constitutional guarantees of persons: *Bridges v. Wixon,* 326 U.S. 135. They can travel throughout the United States in pursuance of their right to work, which is a right necessarily included in the right to enter: *Truax v. Raich,* 239 U.S. 33. Upon their return from Alaska to the mainland they cannot, therefore, be considered entrant aliens: see, *Kwong Hai Chew v. Colding,* 344 U.S. 590; *Carmichael v. Delaney* (CA 9) 170 F.(2d) 239; *United States v. Shaughnessy* (S.D. N.Y.) 113 F. Supp. 49.

ARGUMENT

I.

The Parties Before the Court have Standing to Bring the Within Action

In its order placing this appeal on the calendar for hearing, the court stated:

> "The statement of jurisdiction in this case having been submitted and considered by the court, further consideration of the question of the jurisdiction of this court is postponed to the hearing of the case on the merits. The appellants are requested to discuss on brief and oral argument the right of the union to sue for an injunction upon behalf of its members." (R. 20)

Before discussing the standing of the union to bring the within action, it seems appropriate to call attention to the fact that there are four appellants before the court. They are: 1) The International Longshoremens' & Warehousemens' Union, Local 37, a voluntary association; 2) Christ Mensalvas; 3) Ernesto Mangaoang; and 4) Pedro Bonilla (R. 1, 15). Thus, regardless of the standing of the union, this court has before it individual appellants who are entitled to be heard: *Hague v. Committee for Industrial Organization,* 307 U.S. 496; *United Public Workers v. Mitchell,* 330 U.S. 75.

Turning, however, to the standing of the union, it is respectfully submitted that said union does have standing and interest justifying its appeal being heard.

In *Hague v. Committee For Industrial Organization,* (CA 3) 101 F.(2d) 774, it was stated, almost in passing, *supra,* at 790:

> "The appellants contend that because one of the

> appellees is a corporation and others are unincorporated associations they are not entitled to enjoy some of the civil rights which are the subject of the suit. All of the appellees referred to however, are membership corporations or associations and it clearly appears that the suit was brought by them for the benefit of their members. In our opinion these appellees were proper parties and able to conduct the suit in representative capacities on behalf of the interests of their respective members."

The *Hague* case involved a suit for injunction pursuant to section 1 of the Civil Rights Act of 1871, 17 Stat. 13. This court in *Hague v. Committee For Industrial Organization, supra,* affirmed the Court of Appeals on the merits, but dismissed the action except as to the individual respondents. Justices Roberts and Black felt, *supra,* at 514, that:

> "Natural persons, and they alone, are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures for 'citizens of the United States.' Only the individual respondents may, therefore, maintain this suit."

Justices Stone and Reed, agreed in principle, but felt that the status of the individual respondents to sue should not depend upon citizenship. They stated, *supra,* at 527:

> "Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by §1 of the Civil Rights Act of 1871 to maintain the present suit in equity *to restrain infringement of their rights.* As to American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights

> of freedom of speech and assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons." (Emp. supp.)

Chief Justice Hughes concurred in the views of the opinion of Mr. Justice Roberts, *supra,* at 532.

It is apparent from the above discussion that the rationale of the *Hague* dismissal was that the liberties sought to be protected were such as not to be enjoyed by artificial personalities, and not that voluntary associations, *qua* voluntary associations, lack standing to bring suit.

This conclusion is fortified by the recent case of *Joint Anti-Fascist Refugee Com. v. McGrath,* 341 U.S. 123, where several voluntary asosciations were held to have standing to bring actions for injunctions and declaratory relief. As in the *Hague* case, however, there were multiple, concurring opinions rather than a single majority opinion.

Justices Burton and Douglas felt "the standing of the petitioners to bring the * * * suits * * * clear" (*supra,* 140), stating, *supra,* at 141:

> "We long have granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them."

Mr. Justice Frankfurter agreed that "it is not always true that only the person immediately affected can challenge the action" (*supra,* 154), pointing out, *supra,* at 159, that:

> "The threat which it [i.e., the subversive designnation] carries for those members who are, or *purpose to become,* federal employees make it not a

> finicky or tenuous claim to object to the interference with their opportunities to retain or *secure* such employees as members. * * * " (Emp. supp.)

Finally, Mr. Justice Jackson, while recognizing that "the real target * * * is the government employee who is a member of, or sympathetic to, one or more accused organization" (*supra,* 184), pointed out, *supra,* at 187:

> "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all."

The rule that appears to emerge as the lowest common denominator of the various opinions is "that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation," *Barrows v. Jackson,* 346 U.S. 249, 255. The crucial inquiry, therefore, is: What effect does the proposed interpretation of paragraph (7) of subsection 212(d) have upon the union, as such?

The union "is a voluntary association of over three thousand persons who work every summer in the herring and salmon canneries of Alaska" (R. 1), and "has been for many years a principal bargaining agent in said industries" (R. 2). "[T]hese collective bargaining agreements govern * * * the terms and conditions of employment and seniority of employment in the various salmon and herring canneries in Alaska" (R. 2).

It is clear, therefore, that the appellant union is one of relatively small membership; which, *every year,* dispatches this membership to the various jobs in the

herring and salmon canneries in Alaska. It is readily evident that if any great number of its members ultimately are either excluded upon return from Alaska in the coming years, or decline to risk Alaskan employment because of the possibility of exclusion or future expulsion, the union's ability to fulfill its contractual obligations will be seriously, if not fatally impaired.* Thus the very existence of the union is potentially involved, an interest which clearly justifies its seeking legal redress from the action of the respondent.

This interest of the appellant union is certainly as great as that of the school allowed to challenge a statute that deprived its *potential* pupils of due process: *Pierce v. Society of Sisters*, 268 U.S. 510; or the alien employee allowed to rely upon the rights of his employer: *Truax v. Raich*, 239 U.S. 33; or the white vendor who claimed that an ordinance deprived *potential* Negro vendees of their constitutional rights: *Buchanan v. Warley*, 245 U.S. 60; see also: *Barrows v. Jackson, supra.*

Moreover, the union is the only practical party to fully test the impact of subsection 212(d)(7) upon its

*Upon return from Alaska in the months of August and September, 1953, at least thirty members of the union were held for possible exclusion, and there are presently pending, twelve exclusion proceedings against union members. It is obviously impossible at this time, to estimate the effect these proceedings will have upon the decision of the remaining membership to travel to Alaska in the summer of 1954, but it does represent a more serious problem to the union *now*, than prior to the 1953 season.

non-citizen membership. The individual members are faced with this dilemma: If they decide to travel to Alaska, they thereby risk their ultimate exclusion or expulsion upon their return to the mainland after any future canning season; if, on the other hand, they decide such a risk is too great, they must forego their jobs in Alaska, although such "employment * * * constitutes the source of a substantial portion of their yearly income" (R. 6), and their "contract and property rights will be * * * forfeited" (R. 2).

But, even if the individual members elect to run the risk of Alaskan employment, and successfully gain readmittance to the continental United States upon their return, they will nevertheless suffer a substantial loss of status. This result follows since the readmittance to the mainland will, if the district court's decision is upheld, constitute a new "entry." Conduct in the future may, therefore, subject them to *expulsion* because of the temporal proximity of the later re-entry: see *e.g., Delgadillo v. Carmichael,* 332 U.S. 338; *United States ex rel. Volpe v. Smith,* 289 U.S. 422; *DiPasquale v. Karnuth* (CA 2) 158 F.(2d) 878; *Taguchi v. Carr* (CA 9) 62 F.(2d) 307.

This change of status will embrace all the non-citizen members of the union who travel to Alaska; but the full impact of the change will not be determined judicially except by a plethora of individual habeas corpus actions in the extended future. It is submitted, therefore, that this case is one where, in the words of Mr. Justice Jackson, quoted *supra,* "The only practical

judicial policy * * * is to permit the association * * * in a single case to vindicate the interests of all." The union's suit can best settle the issue of the power of respondent to subject its members to the exclusion process immediately, or to the expulsion process in the future, as the consequence of travel to Alaska.

Finally, two brief points should be mentioned regarding the standing of the union. First, section 301(b) of the Labor-Management Act of 1947, 61 Stat. 156, provides that appellant union "may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States." See also: Rule 17(b), Federal Rules of Civil Procedure. Second, since respondent did not object to the capacity of the appellant union to sue in the District Court, the objection is waived: see, *International News Service v. Associated Press,* 248 U.S. 215; *McCandless v. Furland,* 293 U.S. 67; Rule 12(h), Federal Rules of Civil Procedure.

The appellant union is clearly entitled to an injunction and declaration of the statutory and constitutional rights claimed by the within action.*

For the above reasons, it is respectfully submitted that the union does have standing justifying its appeal being heard with the appeals of the individual appellants herein.

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*It should be noted that the union's interests can only be represented in an affirmative action such as this, since the collateral remedy of habeas corpus is wholly inapplicable.

II.

Congress Did Not Intend to Provide for the Exclusion of Persons Lawfully Admitted for Permanent Residence in the Continental United States Upon Their Return from Alaska After Travel Directly to and from Alaska by United States Transport Facilities in Pursuance of Their Seasonal, Contractual Employment.

The pertinent portion of paragraph (7) of subsection 212(d) of the Immigration and Nationality Act of 1952, 66 Stat. 182, provides:

> "The provisions of subsection (a) of this section * * * shall be applicable to any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States. * * * "

Subsection 212(a), 66 Stat. 182, enumerates the excludable classes of aliens, and is introduced by the language:

> "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States."

The visas referred to are either immigrant or nonimmigrant visas; see sections 203-211 of the Act, 66 Stat. 175-181.

Subsection 101(a)(15), 66 Stat. 166, defines immigrant alien as "every alien except an alien who is within one of the following classes of nonimmigrant aliens." House Report, No. 1365, February 14, 1952, at pages 36-37, explains the basic distinction between immigrants and nonimmigrants:

> "Aliens who meet the qualitative tests and are eligible for admission into the United States are classified under existing law as either immigrants or nonimmigrants. *The immigrant class includes those aliens who seek to enter the United States for permanent residence,* while the nonimmigrant class includes those aliens who seek to enter for temporary periods of stay." (Emp. supp.)

This definition is in full accord with the proposition that immigration concerns immigrants and not permanent residents; see, *Lapina v. Williams,* 232 U.S. 78. The power to exclude does not extend to persons lawfully resident in the United States for when "There being in legal contemplation no entry, there * * * [can] be no exclusion," *Carmichael v. Delaney* (C.A. 9) 170 F.(2d) 239, 243.

Subsection 101(a)(13), 66 Stat. 166, defines entry as:

> " * * * any coming of an alien into the United States, from a foreign port or place or from an outlying possession * * * "

The provisions of subsection 212(d)(7), it is noted, only apply to an alien who "seeks to enter the continental United States."

A cursory reading of paragraph (7) of subsection 212(d) might lead to the conclusion that Congress intended to treat any coming of an alien from the territories as an entry into the United States for the purposes of exclusion. If such an interpretation is adopted, however, it immediately raises the problem of an apparent inconsistency in the use and meaning of the term "entry," since an entry is defined as the "coming of an alien * * * from a foreign port or place or from an

outlying possession." whereas Alaska and the other territories are not foreign ports or outlying possessions.* Indeed, Alaska, and the other territories enumerated in subsection 212(d)(7), are defined as part of the United States, in the geographical sense, in subsection 101(a)(38), 66 Stat. 166.

Assuming, however, that there is no inconsistency between subsection 212(d)(7) and the definition of the term "entry," which is the proper assumption: see, *Helvering v. Credit Alliance Corp.,* 316 U.S. 107; *United States v. Raynor,* 302 U.S. 540, the import of subsection 212(d)(7) should be to provide for the exclusion of aliens resident in the territories who seek to acquire permanent residence in the continental United States; that is, the provision only applies to aliens who attempt to come to the continental United States "from a foreign port or place or from an outlying possession" *via one of the territories.*

An examination of the legislative history of the paragraph confirms this latter interpretation. The original version, S. No. 2550, p. 66 and H.R. No. 5678, p. 36, provided as relevant:

> "The provisions of subsection (a) of this section * * * shall be applicable to any alien who shall leave *the Canal Zone,* Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, *or any outlying territory or possession of the United States,* and who seeks to enter the continental United States or any other place under the

*The outlying possessions are defined in subsections 101(a)(29), 66 Stat. 166, as "American Samoa and Swains Island."

jurisdiction of the United States. * * * " (Emp. supp.)

The italicized portion is that which was deleted by Congress before final passage. The reason for the deletion seems obvious, since, to retain that language would render the subsection redundant in view of the definition of "entry," which itself subjects travel from the deleted areas to the exclusive provisions of the Act;* that is, there would be a direct entry into the continental United States from those areas, rather than an entry *through* a territory of the United States. The fact that the Canal Zone and the outlying possessions appear in the original bills apparently was the result of the ancestry of the provision. Former 8 U.S.C. §173, 39 Stat. 874, passed in 1917, is specified by the House Report, *supra,* at pages 144-145, as the immediate predecessor to subsection 212(d)(7). It provided:

> "The term 'United States' shall be construed to mean the United States, and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone; but if any alien shall leave the Canal Zone or any insular possession of the United States and attempt to enter any other place under the jurisdiction of the United States, nothing contained in this chapter shall be construed as permitting him to enter under any other conditions than those applicable to all aliens."

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*Entry is the "coming of an alien *into the United States.*" The definition of "United States" does not include either the Canal Zone or the outlying possessions, but does include the territories enumerated in subsection 212(d)(7); see, subsection 101(a)(38); 66 Stat. 166.

This legislative genesis is more important, however, for the fact that (as stated in the House Report, *supra,* at page 53, and Senate Report, No. 1137, January 29, 1952, at page 14):

> "Section 212(d)(7) of the bill continues in effect the special procedures applicable to aliens who travel from the Panama Canal Zone, Territories, or outlying possessions to the continental United States or any other territory under the jurisdiction of the United States. Under the bill such procedures will also be applicable to aliens traveling from Alaska to the continental United States. * * * "

It should be noted that the reports state that the paragraph applies to aliens who *travel from,* rather than *return from,* the territories to the continental United States.

The former law, it is seen, drew the distinction between the continental United States and the *insular* territories. The latter category included Hawaii: see, former 8 U.S.C. §297, 32 Stat. 177, but not Alaska: see, former 8 U.S.C. §295, 32 Stat. 176, 33 Stat. 428, which was considered part of the mainland. Under the present law, however, Congress recognizes three categories of American territory: the continental United States, the territories (including Alaska), and the outlying possessions (which for purposes of entry are treated as foreign ports). This fact explains why the reports state that only travel from Alaska is modified by subsection 212(d)(7).

A deeper examination of the historical roots of subsection 212(d)(7), moreover, discloses that the ration-

ale behind the exclusion of aliens coming to the continental United States from the insular territories has been the theory that the original entry into the territories is only *conditional,* and not one permitting, automatically, an unqualified entry into the continental United States.

The cases of *In re Singh* (N.D. Cal.) 209 Fed. 700, and *Healy v. Backus* (C.A. 9) 221 Fed. 358, involved the validity of amended paragraph (3) of Rule 14, of the 1913 regulations of the Commissioner General of Immigration, which provided (as quoted in the *Healy* case, *supra,* at 362):

> "That aliens applying at continental ports and surrendering the certificate above described shall, upon identification, be permitted to land, provided it appears that at the time such aliens were admitted to the Philippines they were not members of the excluded classes or likely to become public charges if they proceeded to the mainland."

In discussing this rule, the Court of Appeals pointed out in the *Healy* case, *supra,* at 362-363:

> " * * * The amended rule discards the idea that aliens once admitted to insular possessions are entitled as of course to admission to the continent without further examination, and has injected the thought that aliens might be likely to become a public charge on the mainland when such likelihood would not exist as to them in the insular possessions, and hence they are subject to further examination upon their entry at continental ports."

Regarding the basis for the new rule, the District Court in the *Singh* case stated, *supra,* at 703-704:

> "There may be reasons for rejecting an alien at

> continental ports which would not exist if he were applying to enter the Philippines. * * * A more rigid test may therefore well be applied to those seeking admission to the mainland than that applied to those seeking admission to the Philippines."

The Court of Appeals in the *Healy* case, *supra,* at 363, agreed:

> " * * * Why is it not a reasonable and perfectly natural * * * [practice] to admit such persons to the insular possessions *on condition* that if they proceed to the mainland they must submit to further examination as to their likelihood of becoming public charges in the latter country? It is but the application and enforcement of the act according to the conditions found to exist, and is not, we think, beyond the authority conferred by Congress. *The admission to the insular possessions* under the amended Rule 14 *is not an admission generally, but only qualifiedly and conditionally, so that applicant's exclusion from the continent may yet proceed upon the ground that he is one of the excluded classes, and not upon the ground of having, after entry, become a public charge for causes theretofore existing after unqualified admission."* (Emp. supp.)

Thus, the exclusion of aliens who seek to enter the continental United States for permanent residence from the insular territories was upheld precisely because the original entry into the insular territories was not an unqualified admission into the United States generally. See also: *Matsuda v. Burnett* (C.A. 9) 69 F.(2d) 272; *Sugimoto v. Nagle* (C.A. 9) 38 F.(2d) 207.

This conditional entry theory is not only totally con-

sistent with the proposed interpretation of the instant provision, but, from an examination of the congressional debates, it becomes clear that it was the theory which guided Congress in its passage of subsection 212(d)(7).

On April 14, 1952, reported in 98 Cong. R. No. 69,* the proposed act was opened for amendment in the House of Representatives. Mr. Farrington, delegate from Hawaii, introduced the following addition to the proposed definition of the phrase "lawfully admitted for permanent residence" in paragraph (20) of subsection 101(a):

> "Persons who were admitted to Hawaii under the last sentence of section 8(a)(1) of the Act of March 24, 1934, as amended (48 Stat. 456), shall be deemed to have been lawfully admitted for permanent residence." (page 4468)

The act referred to is the Philippine Independence Act which subjected Filipinos who came to the mainland after 1934 to the immigration laws. As nationals they could before then come to the continental United States without restriction: see, *Toyota v. United States,* 268 U. S. 402; *Gonzales v. Williams,* 192 U.S. 1; *Mangaoang v. Boyd* (C.A. 9) 205 F.(2d) 553. The "last sentence" referred to exempted from immigration restrictions those Filipinos who only sought entry into Hawaii. Thus the proposed addition would have made those Filipinos who came to Hawaii unrestricted by the immigration laws, permanent residents of the United States.

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*Page references hereafter are to this issue of the Congressional Record.

Mr. Walter, the co-author of the act, concluded his argument against the addition as follows:

> " * * * to adopt the amendment, by so doing, you are saying, 'You can come to the mainland,' and I do not think we ought to do that." (page 4469)

This comment is vitally significant, for it is a clear expresson of Mr. Walter's opinion that if an alien is *a permanent resident* of the United States, *residing in Hawaii* he *cannot be prevented from traveling to the continental United States.*

The amendment was rejected, but later on the same day Mr. Farrington, as a companion proposal, introduced the following substitution for the pertinent provisions of subsection 212(d)(7):

> "The provisions of subsection (a) * * * shall be applicable to any alien who shall leave the Canal Zone, Guam, Puerto Rico, or the Virgin Islands of the United States or any outlying territory or possession of the United States, other than Hawaii or Alaska, and who seeks to enter the continental United States. * * * " (page 4471)

The debate on the proposed amendment again confirms the suggested interpretation. Mr. Farrington stated in support of the amendment:

> "The purpose of this amendment is to give aliens who now enjoy the status of permanent residents of the Territory of Hawaii the status of permanent residents of the United States.
>
> "The practical result of the adoption of this amendment would be to provide for aliens in Hawaii who are permanent residents the same privilege of travel to the States and among the States

that is permitted to aliens who are permanent residents of the States." (page 4472)

"It seems to us in Hawaii that both the interests of ourselves as well as that of the States would have been better served if these people could have moved freely to California just like they move from California to Nevada or Oregon between the States." (page 4472)

Mr. Walter in reply to this argument did not challenge the underlying thesis that permanent residents of the United States are unaffected by the section. He stated, in part:

" * * * It is important to bear in mind the fact that there are a great many aliens in Hawaii who have never been properly screened. There they are, and if this amendment is adopted they would come to the United States without any further screening and could remain here. * * * It is entirely a question of aliens coming to the United States, and I for one do not think they should be admitted whether they come from Hawaii or whether they come from Europe, without being screened in order to determine whether or not they are subversive."* (page 4473.)

"The only thing under this law that is required of them is an additional screening when they arrive at the Pacific coast in order to determine whether or not they are admissible under the general immigration laws of the United States; that is all." (page 4473.)

*These comments are consistent with the proviso in subsection 212(d)(7) which withholds from Filipinos who entered Hawaii unrestricted by the immigration laws the exemption from the visa-exclusion provisions of paragraphs (20) and (21) of subsection 212(a).

The tenor of Mr. Walter's argument is markedly reminiscent of the discussion in *Healy v. Backus, supra.*

To recapitulate the history of restrictions upon entry from the territories: In 1913, by regulation, the practice of admitting aliens into the continental United State automatically upon proof of lawful admittance into the insular territories was abandoned for the practice of making the original entry into the territory conditional only, subjecting the alien who seeks entry into the continental United States to further exclusion proceedings. This procedure was upheld, in 1915, upon the conditional entry theory, in *Healy v. Backus, supra.*

In 1917, Congress legislated generally on the subject, but did not restrict travel of aliens from Alaska, which at that time was treated as part of the continental United States.

In 1952, Congress provided that admittance to Alaska should likewise be conditional, no longer entitling aliens with such residence to admittance to the continental United States as a matter of right.

The individual appellants herein, however, (as well as those they and the union represent) are non-citizens who have already been *unqualifiedly* admitted to the United States for permanent residence; they are not, therefore, immigrants seeking to come to the mainland.

The mere fact that their employment requires them to travel to the territory of Alaska does not alter the nature of their original entry, or their status as residents of the United States: see, *Kwong Hai Chew v. Colding,* 344 U.S. 590; *Carmichael v. Delaney, supra.* In *United States v. Shaughnessy* (S.D. N.Y.) 113 F.

Supp. 49, after the mandate of this court in the *Chew* case had been returned, Chew brought a supplemental writ of habeas corpus to test the validity of the District Director's denial of bond pending his hearing. The District Court ordered Chew released, stating in part, *supra,* at 53:

> "[The] * * * underlying rationale appears to be that the circumstance of his employment as a seaman on a ship of American registry did not break the continuity of his permanent residence so as to deprive him of those rights which clearly he enjoyed as an alien resident on terra firma."

It should be noted that the departure from the continental United States in the *Chew* and *Carmichael* cases involved travel to foreign ports and territory. Here, however, *the travel* involved *is within the United States after unqualified admission into the United States.* In the words of Representative Walter, as permanent residents of the United States "[they] can come to the mainland."

Thus, the District Court erred when it concluded that the exclusion provisions of subsection 212(a) apply to appellants because "The words 'any alien' include aliens situated as are those here involved," *International Longshoremen's and W. Union v. Boyd* (W.D. Wash.) 111 F. Supp. 802, 806. Such a conclusion fails to appreciate that the words "any alien" are modified by the phrase "who seeks to enter the continental United States." The aliens involved herein, however, are not seeking to enter the United States; they are already lawfully admitted for permanent residence.

The District Court, therefore, should be reversed,

having erroneously interpreted congressional intent to the detriment of appellants' rights to travel to, work in, and return from Alaska.

III.

Congress Does Not Have the Constitutional Power to Provide for the Exclusion of Aliens Who Are Lawfully Admitted to the Continental United States When They Seek to Return After Travel Directly to and from Alaska in Pursuance of Their Seasonal Employment in Alaska.

The Court below concluded as regards the constitutional issues presented, in *International Longshoremen's & W. Union v. Boyd,* 111 F. Supp 802, at 807:

> " * * * Keeping clearly in mind the vast and broad powers of Congress to enact legislation excluding or expelling aliens as balanced against the limited constitutional rights of all aliens, including lawfully admitted resident aliens of continental United States, we cannot hold that that portion of the statute under attack offends or is beyond the constitutional authority vested in Congress even though its provisions make applicable restrictions upon aliens leaving the territories of the United States, including Alaska, and entering or re-entering other territories, states or places under United States jurisdiction when not applicable to aliens permanently resident in or traveling within or between the states. Neither are we aware of any constitutional limitation upon the power of Congress which would forbid its classification in the same category, for the purpose of exclusion, lawfully admitted aliens permanently residing in continental United States when seeking re-entry into the states from a territory of the United States,

and similarly situated aliens seeking re-entry to the United States from a foreign land."

The first relevant inquiry, therefore, is: What is the nature and source of the exclusion power? In the early *Head Money Cases,* 112 U.S. 580, the power of Congress to impose a head tax upon the ship companies for every alien brought into the United States was challenged; this court, identifying the power employed, stated, *supra,* at 595:

> " * * * the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce, of that branch of foreign commerce which is involved in immigation."

Having established the constitutional source of the power to regulate immigration, the opinion concluded, *supra,* at 600:

> " * * * Congress having the power to pass a law regulating immigration as a part of the commerce of this country with foreign Nations, *we see nothing in the statute by which it has here exercised that power forbidden by any other part of the Constitution."* (Emp. supp.)

In *Chae Chan Ping v. United States* (The Chinese Exclusion Case) 130 U.S. 581, the next important case to discuss the exclusion power, this court stated, *supra,* at 604:

> " * * * The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, *restricted* in their exercise *only by the Constitution itself and*

consideration of public policy and justice which control, more or less, the conduct of all civilized nations." (Emp. supp.)

The italicized portions from the opinions in the *Head Money* and *Chinese Exclusion* cases, demonstrate that, from the earliest judicial considerations of the exclusion power, it has never been argued or assumed that the power was unrestricted. *The power to exclude is a sovereign power, but* one arising from the power delegated to Congress to regulate foreign commerce, and which *is limited by the Constitution.*

In the leading case of *Ekiu v. United States,* 142 U.S. 651, these concepts were restated, *supra,* at 659, as follows:

> "It is an accepted maxim of international law, that every sovereign nation has power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. * * * In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom *the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States;* to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to

make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof. U.S. Const. art. 1, §8; *Head Money Cases,* 112 U.S. 580; *Chae Chan Ping v. United States,* 130 U.S. 581, 604-609." (Emp. supp.)

Thereafter, *supra,* at page 660, the opinion amplified the limitations upon the exclusion power:

"* * * It is not within the province of the judiciary to order that *foreigners who have never* been naturalized, nor *acquired any domicil or residence within the United States, nor even been admitted into the country, pursuant to law,* shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. *As to such persons, decisions of executive or administrative officers acting with powers expressly conferred by Congress, are due process of law."* (Emp. supp.)

These concepts were recently reaffirmed in *United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, at 543:

"Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. *Whatever the rule may be concerning deportation of persons who have gained entry into the United States,* it is not within the province of any court, unless expressly authorized by law, to review the determination of the political

branch of the government to exclude a given alien." (Emp. supp.)

When Congress exercises the commerce power in fields other than immigration, it is clear that "resort to the Commerce Clause can [not] defy the standards of due process." *Secretary of Agri. v. Central Roig. Ref. Co.,* 338 U.S. 606, 616.

Moreover, and more important to the issues involved herein, the status of imports (immune from state taxation) survives only "until they are sold, removed from the original package, or put to the use for which they are imported." *Hooven & Allison Co. v. Evatt,* 324 U.S. 652, 657. In other words, once goods are merged with the general mass of goods within the United States they lose their status as imports. Similarly, once aliens have lawfully acquired permanent residence, they cease, in the constitutional sense, to be immigrants. They may be deported pursuant to law, but they have become "invested with rights guaranteed by the Constitution to all peoples within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment," *Bridges v. Wixon,* 326 U.S. 135, Justice Murphy concurring at 161, and quoted with approval in *Kwong Hai Chew v. Colding,* 344 U.S. 590, 596-597 (footnote 5). Their "status as * * * person[s] within the meaning and protection of the Fifth Amendment cannot be capriciously taken from [them]," *Kwong Hai Chew v. Colding, supra,* at 601.

Once an alien is "admitted to the United States under the Federal law * * * [he is] admitted with the

privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union." *Truax v. Raich,* 239 U.S. 33, 39.

Paragraph (38) of subsection 101(a), 66 Stat. 166, defines United States as:

> " * * * except as otherwise specifically herein provided, when used in a geographical sense * * * the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States."

Paragraph (36) of subsection 101(a), 66 Stat. 166, provides:

> "The term 'State' includes (except as used in section 310(a) of title III [not involved herein]) Alaska, Hawaii, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States."

Thus, while it is true, as is stated in *Hooven & Allison Co. v. Evatt, supra,* at 671-672:

> "The term 'United States' may be used in any one of several senses. It may be merely the name of a sovereign occuping the position analogous to that of other sovereigns in the family of nations. It may designate the territory over which the sovereignty of the United States extends, or it may be the collective name of the states which are united by and under the Constitution."

it is clear that when dealing with the status of aliens lawfully admitted for permanent residence, the term "United States" is used in the sense of "the territory over which the sovereignty of the United States ex-

tends."* See: *Toyota v. United States,* 268 U.S. 402; *Gonzales v. Williams,* 192 U.S. 1.

Although Congress can regulate the territories free of the constitutional restrictions regarding legislation for the states: see, *e.g., Downes v. Bidwell,* 182 U.S. 244; *Hawaii v. Mankichi,* 190 U.S. 197; *Balzac v. Puerto Rico,* 258 U.S. 298; when it deals with the status of resident aliens, it is subject to constitutional restrictions. The instant provision, as interpreted, is a *restriction on the status and rights of persons to travel, work and remain within the territorial limits of the United States;* it is not merely the regulation of the territories.

The individual appellants (and the membership of the appellant Union), enjoy employment rights pursuant to lawful collective bargaining contracts in the territory of Alaska, "which constitute * * * the source of a substantial portion of their yearly income" (R. 6). Providing for the potential exclusion of aliens who cannot otherwise be expelled, as in the case of Filipinos like appellant Mangaoang [see, *Mangaoang v. Boyd, supra,* No. 345, October Term, 1953],** if they travel

*This meaning is also indicated by subsection 212(d)(7) itself, since its provisions cover travel from the territories to "the continental United States *or any other place under the jurisdiction of the United States.*"

**There are more situations where a non-citizen may not be expellable, but nevertheless excludable, than the cases of Filipinos who came to the United States prior to the effective date of the Philippine Independence Act. For example: aliens who have been convicted of a single crime involving moral turpitude prior to entry are excludable [Section 212(a)(9), 66 Stat. 182],

to Alaska, is tantamount to providing for the forfeiture of their job rights heretofore enjoyed there. To deny such job opportunities is "tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases *they cannot live where they cannot work.*" *Truax v. Raich, supra,* at 42. (Emp. supp.)

In *Kwong Hai Chew v. Colding, supra,* at 592, the facts relevant to residence and employment were:

> " * * * the resident alien is a seaman, he currently maintains his residence in the United States and usually is physically present there, however, he is returning from a voyage as a seaman on a vessel of American registry with its home port in the United States, that voyage has included scheduled calls at foreign ports in the Far East. * * * "

This Court thereafter stated, *supra,* at 600:

> " * * * the constitutional status which petitioner indisputably enjoyed prior to his voyage * * * [was not] terminated by that voyage. From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien, and we do not now reach the question whether he is to be so treated."

but also commented, *supra,* at 598-599:

> " * * * we interpret this regulation as making no

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whereas, to be expellable, the crime must have been committed within five years of the last entry [Section 241(a)(4), 66 Stat. 204]. Moreover, even if the noncitizen gains admittance upon return from Alaska, if the return is treated as a new *entry,* new possibilities for expulsion may arise because of the temporal proximity of the later "entry" to acts which may be committed in the future. Thus, there would be a substantial change of status, in any event.

> attempt to question a resident alien's constitutional right to due process. Section 175.57(b) uses the term 'excludable' in designating the aliens to which it applies. That term relates naturally to *entrant* aliens and to those assimilated to their status. The regulation nowhere refers to the *expulsion* of aliens, which is the term that would apply naturally to aliens who are *lawful permanent residents physically present within the United States.*"* (Emp. supp.)

Paragraph (7) of subsection 212(d), as interpreted, provides, in any event, that resident aliens whose employment requires that they travel to Alaska (as distinguished from foreign ports) be "treated as * * * entrant alien[s]" upon their return, despite the fact that they have never left the territory of the United States. We are thus confronted with a far more compelling example of the issue left in doubt in the *Chew* case.

If the status of permanent resident alien, which "cannot be capriciously taken," and which, if taken, deprives one "of all that makes life worth living," has any substantial significance, *it must survive travel within the United States in pursuance of one's employment,* a right which is necessarily included in the right to enter the United States: *Truax v. Raich, supra.*

The power to exclude, it has been seen, is derived from the power to regulate foreign commerce: *Head Money Cases, supra; Ekiu v. United States, supra.* Thus the requirement of any entry into the United

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*It is appropriate to note that the District Court neither discussed nor cited the *Chew* case.

States as the precondition to exclusion: *Carmichael v. Delaney* (CA 9) 170 F.(2d) 239, is not merely a statutory precondition, but is, in fact, *the constitutional precondition* to exclusion. Thus, the essential question is: Does an alien enter, in the constitutional sense, upon his return from Alaska to his permanent residence on the mainland, when he has never left the territory of the United States?

We are not, it must be restressed, dealing with the rights of "foreigners who have never * * * acquired any domicile or residence within the United States," *Ekiu v. United States, supra.* Nor are we dealing with inanimate goods, which may constitutionally be considered imports although their origin of transit is the territories and not foreign ports: see, *Hooven & Allison Co. v. Evatt, supra.* We are concerned with the status of persons lawfully admitted to the United States for permanent residence who have never left "the territory over which the sovereignty of the United States extends."

When the power to exclude was challenged in *Healy v. Backus* (CA 9) 221 Fed. 358, the alien having acquired lawful residence in the territories, the exclusion was upheld because the alien had only made conditional entry, and thus did not have to be expelled. The court stated, *supra,* at 363:

> "* * * The admission is not an admission generally, but only qualifiedly and conditionally, so that applicant's exclusion from the continent may yet proceed upon the ground that he is one of the excluded classes and not upon the ground of having,

> after entry, become a public charge for causes theretofore existing after unqualified admission."

The necessary and assumed converse of this rule is obvious: once an alien has obtained unqualified admission into the United States generally he may travel throughout the territory of the United States without fear of being excluded.

This court was doubtful that there was an entry, in the constitutional sense, in the *Chew* case, where the alien's claim to continuous residence within the United States was only service on a vessel of American registry. If doubts exist under those circumstances, surely no doubt can exist where there is actual, continuous physical residence within the United States. To hold otherwise is capriciously to deprive the resident alien of his right to remain, travel and work within the United States; for, in actuality he would be *expelled* by the facile, semantic technique of labeling the expulsion an exclusion.

It is therefore submitted that the District Court erred in its conclusion that subsection 212(d)(7) of the Immigration and Nationality Act of 1952, as interpreted and applied to appellants, does not transgress the constitutional powers of Congress to regulate foreign commerce.

CONCLUSION

For the reasons above stated it is respectfully submitted that the judgment of the court below should be reversed, and the injunction and declaration of rights prayed for issue.

Respectfully submitted,

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No. 195

Supreme Court of the United States

OCTOBER TERM, 1953

INTERNATIONAL LONGSHOREMENS' AND WAREHOUSEMENS' UNION, LOCAL 37, *et al.*, *Appellants,*

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

I.

THE COURT HAS JURISDICTION OVER THE SUBJECT MATTER AND THE PARTIES

A. The Union Has Standing to Maintain This Suit.

Appellee's position can be fairly characterized by the statement found on page 16 of his brief:

> "The union as such is not here involved. It is not an alien. No statute or regulation is or will be enforced against it. It will not leave the United State and be faced with the possibility of exclusion in seeking to return."

This position, it is submitted, ignores the claim (and

possibility), that the appellant union has a separate interest which is threatened by the present interpretation and enforcement of subsection 212(d)(7). On page 20 of the brief it is stated, in apparent answer to the union's contentions:

> "Obviously if only two members of the union were aliens, the union could not claim that its interest would be affected. The fact that in this particular case, there may be a somewhat larger number of alien members does not alter the situation. It is still clear that the union as such in its collective capacity has no direct interest in this suit."

Since the appellee urges that the appellant union's standing may depend on the number of aliens in its membership, it seems appropriate to call attention to the testimony of Mr. George Valdes, who, with appellant Mensalvas, and Mr. Vincent Pilien, appeared before the President's Commission on Immigration and Naturalization, on behalf of the appellant union. Mr. Valdes, at page 991 of the *Hearings,* stated:

> "Our union is composed of 80 per cent Filipino-Americans, and the remaining 20 per cent consists of Negro-Americans, Mexicans, Puerto Ricans, Chinese, Japanese and Hawaiians, and so-forth. These workers are engaged in the canned-salmon industry about 2 to 4 months during the summer period, and the rest of the year they are engaged in the agricultural crops in the State of California, especially."

See also the statement filed on behalf of the appellant union, which appears at pages 994-1001 of the *Hearings.*

It is thus clear, if this is important, that the status of the overwhelming majority of the membership of the

appellant union is affected by the proposed interpretation of subsection 212(d)(7).[1]

The above quotations from appellee's brief also illustrate his contention that the appellant union has no standing since the statute is not directed against it. (See also, Appellee's Brief, p. 22.) Appellants do not read the cases cited in their opening brief as setting any such requirement. The rule, it is submitted, is that the statute need only affect the rights of the party litigant, whether directly or indirectly. Thus, in *Buchanan v. Warley,* 245 U.S. 60, and *Barrows v. Jackson,* 346 U.S. 249, the white litigants were not prevented from buying real estate. Their standing arose from the fact that their potential market as vendors was indirectly curtailed. The case of *Moffat Tunnel League v. United States,* 289 U.S. 113, relied on by appellee, involved only the remoteness of the effect of a regulation of the Interstate Commerce Commission, and has no controlling relation to the issues presented by the union's suit. The instant case clearly falls within class of cases illustrated by *Pierce v. Society of Sisters,* 268 U.S. 510, commented upon recently by Mr. Justice Burton in *Barrows v. Jackson,* 346 U.S. 249, at 257, as follows:

"In short, the schools were permitted to assert

[1] The union, of course, will lose the dues of every member who is excluded, or, who abandons his Alaska employment altogether for fear of the risk to his status as a permanent resident of the United States. If the number becomes large enough, which is possible, with the presence of a dozen fellow members already caught in the net of the 1952 act, it will also jeopardize the union's ability to fulfil and maintain its contractual duties and rights; see, *Hynes v. Grimes Packing Co.,* 337 U.S. 86, at 99.

> in defense of their property rights the constitutional rights of parents and guardians."

It seems appropriate, while touching the problem of remoteness, also to call attention to the words of Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, at 154:

> "The fact that an advantageous relationship is terminable at will does not prevent a litigant from asserting that improper interference with it gives him 'standing' to assert a right of action."

Finally, on page 23 of appellee's brief, in footnote 8, it is timidly suggested that the case may be moot. This suggestion is totally without merit. First, the Collective Bargaining Agreement referred to (which is on file with the Clerk of this Court) is only "The most recent collective bargaining contract of the union" (R. 2, Fdg. VII), and, moreover, is "in full force and effect until April 30, 1954" (Page 22 of the exhibit). Second, since the issues presented by this appeal will be of a recurring nature, i.e., "every summer" (R. 1, Fdg. II) there will be a dispute as to appellee's interpretation of subsection 212(d)(7), the remedy of injunction is still appropriate: *J. I. Case Co. v. National Lab. Rel. Bd.,* 321 U.S. 332. See also: *Walling v. Helmerich & Payne Inc.,* 323 U.S. 37; *Federal Trade Comm. v. Goodyear Tire & Rubber Co.,* 304 U.S. 257.

B. There Is a Justiciable Controversy.

On page 2, under Questions Presented, appellee summarizes his contention as follows:

> "Whether the controversy is justiciable since there is no allegation that any effort has yet been

made to enforce the terms of the statute against appellants or any individuals they purport to represent."

and on page 24, he states:

"* * * appellants solicit an advisory determination on a hypothetical case that may never materialize as to them.'

It is admitted, however, in the Appendix (pages 77 and 78 of appellee's brief), that at least 12 members of the union (properly represented by the individual appellants), are being held for warrant proceedings, as was stated in the footnote on page 11 of appellant's opening brief. This was what was threatened by appellee a year ago, and the reason for the declaratory and injunction action being brought initially, prior to the 1953 season and the actual exclusion of any individual members of the union. There was not only an actual controversy at the commencement of the action, but there are now at least a dozen individuals represented in this action who are presently being held for exclusion.[2] See, *Railway Mail Assn. v. Corsi,* 326 U.S. 88, 93, (footnote 10). Their exclusion cases are awaiting this Court's decision, but they are not alone in this

[2] As is noted in appellee's appendix, at page 78 of his brief, the basis for the exclusion proceedings is prior conviction of a crime involving moral turpitude. This fact highlights the importance to these individuals of their status as permanent residents of the United States, since such an act subjects them to exclusion pursuant to subsection 212(a)(9), but does not subject them to expulsion unless the crime was committed within five years of the last entry: subsection 241(a)(4).

regard. In *Haymes v. Landon* (S.D. Cal.) 115 F. Supp. 506, in denying an application for a three-judge court, it is stated at 509:

> "The fact that a District Court did convene three judges and hear that case, is cited by petitioner as authority for this court to hear the present case, and try anew in this District Court what another District Court has already decided and the Supreme Court is about to review. Administrative celerity can hardly decide petitioner's case until enough time has elapsed that there will be a Supreme Court determination of the question which may, but might not, be the basis of ultimate administrative decision in this matter."

Appellee, as below, relies chiefly upon the case of *United Public Workers v. Mitchell,* 330 U.S. 75. Mr. Justice Reed, *supra,* at 88, pointed out, quite clearly that in that case:

> "[Appellants] * * * declare a desire to act contrary to the rule against political activity but not that the rule has been violated."

And further, *supra,* at 90:

> "We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication."

In the present case, however, an action was brought by, and in behalf of, individuals who intended to do, and did, a specific act: namely, travel directly to, and return directly from, Alaska. This case does not, therefore, present hypothetical issues. It presents a specific, concrete controversy over the application of a specified

statute because of this travel.[3] These facts clearly bring this case within the holding of *Railway Mail Assn. v. Corsi,* 326 U.S. 88, in which Mr. Justice Reed stated, *supra,* at 93:

> "*The conflicting contentions* of the parties in this case as to the validity of the state statute *present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. Legal rights* asserted by appellant are threatened with imminent invasion by appellees and *will be directly affected* to a specific and substantial degree by *decision of the questions of law.*" (Emphasis supplied.)

There is nothing, it is submitted, that can distinguish the instant facts from the *Corsi* case. If jurisdiction does not exist here, then there is little left of the intended effect of the Declaratory Judgment Act, 28 U.S.C. §2201. See, *McGrath v. Kristensen,* 340 U.S. 162, 169.

Appellee's position amounts to a request that this

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[3] Appellant Mangaong is business agent of the appellant union (R. 2, Fdg. III). Under section 26 of the Collective Bargaining Contract (on file with the Clerk of this Court) he is the duly authorized agent to act for the Union. The section also provides for the settlement of disputes, if possible, in Alaska. He has a contractual duty, therefore, to travel to Alaska, an interest which justifies his maintenance of this action irrespective of whether or not he actually goes there. Cf. also the testimony of Mr. Valdes, on this point, in *Hearings Before The President's Commission On Immigration,* p. 991. He is not presently deportable under subsection 241(a)(6) of the act; *Mangaoang v. Boyd* (C.A. 9) 205 F.(2d) 553, but would be excludable under subsection 212(a)(28). The same is true of appellant Mensalvas, (R.6, Fdg. IX).

court postpone consideration of the vexing legal issues presented (which are ripe for decision), to the indefinite future and thus prolong a state of confusion which is helpful neither to the parties, the alien population as whole, or to the judiciary. (See: *Haymes v. Landon* (S.D. Cal.) 115 F. Supp. 506) and which will require twelve individuals, properly represented in this action, to pursue unnecessary, lengthy and costly legal action by way of habeas corpus, during which time their freedom may be denied them.[4]

It is submitted that the above considerations fully dispose of the merits of appellee's contentions. Regarding this issue, at least, the court below was correct. See also, *Haymes v. Landon, supra,* at 509.

C. The Attorney General Is Not An Indispensible Party.

Appellee contends, on pages 33-34 of his brief, that the dispute here is not localized; that the District Court is not in a position to settle the controversy; and that his "sole function * * * is to examine aliens seeking to enter and detain for further injuiry any alien whose right to land does not appear clear and beyond doubt" (Appellee's Brief, pp. 34-35). Further, he states that "There is no particular reason to believe that the aliens here involved would all attempt to reenter the United

[4] There is no right to bond pending appeal from an exclusion order. The fact that they are now released is not determinative, as appellee may well decide to revoke the present arrangement as soon as final orders of exclusion are obtained. This was, at least, the position of the Immigration Service on the East coast; see: *United States v. Shaughnessy* (S.D. N.Y.) 113 F. Supp. 49, at 52.

States at the particular port in the particular district where this proceeding was commenced" (Appellee's Brief, p. 38).

First, it should be pointed out that the admitted facts indicate that the members return to Seattle (R.2, Fdg. VII). This is in accordance with the Collective Bargaining Contract (on file with the Clerk of this Court) which provides in section 19, that the membership are furnished transportation from and return to the port of embarcation, which is Seattle. The appellee is admittedly the responsible immigration officer in Seattle (R.2, Fdg. IV).

Second, the power to detain the alien members of the appellant union is the point in contest, precipitated by a disagreement regarding the status of appellants and those they represent. If appellee desists in detaining those he already is detaining, and is ordered to detain no other aliens similarly situated, the matter is at an end. Nor is any affirmative action on the part of the Attorney General required to settle the issues presented. It is therefore submitted that the requirements enumerated in *Williams v. Fanning,* 332 U.S. 490, and *Hynes v. Grimes Packing Co.,* 337 U.S. 86, are fully met. The court has before it all the parties necessary to fully adjudicate the issues and implement its decision.

Finally, appellee concludes, on page 38 of his brief, that:

> "An order in this case would not be binding on the Attorney General, the Board of Immigration Appeals, or the Commissioner of Immigration and Naturalization, who have ultimate authority to administer the immigration and nationality laws and

to determine the admissibility and deportability of aliens."

Appellants are unable to fully comprehend the intended meaning of this argument, for surely, it cannot be interpreted as meaning that the Attorney General or his subordinates would refuse to follow the decision of this court.[5] What is more striking, perhaps, is the fact that the Attorney General is represented on the brief that raises this argument. He is having his hearing on the merits the very moment the argument is urged that he will not be bound by the outcome.

D. The Remedy Is Appropriate.

In order to avoid a hearing of the issues on the merits, appellee also seeks aid from the recent case of *Heikkila v. Barber,* 345 U.S. 229, in which it was stated, *supra,* at 235, that "Now, as before, he [the alien] may attack a *deportation order* only by habeas corpus." (Emphasis supplied.) Appellee, on page 39 of his brief, however, would have us believe that the *Heikkila* case stands for the rule "that habeas corpus is the exclusive remedial device for judicial inquiry in deportation cases." How such an interpretation can be urged is beyond the understanding of appellants, for in the *Heikkila* case itself the cases of *Perkins v. Elg,* 307 U.S. 325, and *McGrath v. Kristensen,* 340 U.S. 162, which involved the determination of a *status* (as here), were distinguished on that ground, rather than overruled. In the *Kristensen* case it is stated, *supra,* at 169:

"Where an official's authority to act depends

[5] This argument could be made in any habeas corpus-deportation case with equal merit.

> upon the status of the person affected * * * that status, when in dispute, may be determined by a declaratory judgment proceeding * * * This is an actual controversy between the alien and immigration officials over the legal right of the alien to be considered for suspension. As such a controversy over federal laws, it is within the jurisdiction of federal courts * * * "

Moreover, the *Heikkila* case involved an attack of a deportation order pursuant to the 1917 act, rather than the 1952 act which is involved herein. This fact would make the *Heikkila* case doubtful authority, at best, in view of the decision in *Rubinstein v. Brownell* (C.A. D.C.) 206 F.(2d) 449, which is now pending before this court: October Term, 1953, No. 300.

II.

THE STATUTE WAS IMPROPERLY CONSTRUED AS APPLYING TO ALIEN PERMANENT RESIDENTS OF THE UNITED STATES WHO SEEK TO RETURN TO THEIR PERMANENT RESIDENCE ON THE MAINLAND AFTER TRAVELING TO ALASKA

Appellee concedes, on page 44 of his brief, that:

> "Undoubtedly, the main purpose of these provisions was to prevent excludable aliens from using entry into and residence in the territorial possessions as a means of entry into the United States."

As was anticipated in appellants' opening brief, at pp. 15-16, to espouse appellee's interpretation of the statute, however, it is necessary to urge the proposition that Congress has used "entry" in sub-section 212(d)(7) in a different and undefined sense.[6]

[6] It should be noted, in this connection, that both S. Rep. 1137, 82nd C., 2nd S., at p. 4, and H. Rep. 1365, 82nd

Appellee undertakes this task in two ways. First, it is urged that subsection 212(d)(7) clearly must be interpreted as providing, in effect, that Alaska be treated for exclusion purposes as a foreign country. This assumption is made explicitly for example, on page 47:

> " * * * the underlying concept of Section 212 (d)(7), recognized as such by Congress is that, for the purposes of entry into the United States by aliens, the territorial possessions are different from the continental United States and in status like that of a foreign country."

This assumption is implicit when appellee relies heavily on the reentry doctrine, on pages 48-50, and is then stated explicitly again, on page 51, as follows:

> "While the reentry doctrine concerns primarily aliens returning from a foreign port or place, it seems clear that Section 212(d)(7) was designed to assimilate Alaska to a foreign country for the purpose of limiting admissibility to the United States."

It should be noted that because Congress treats Alaska differently for certain purposes, it does not follow, automatically, that the only possible status for Alaska is that of a foreign country.

Apparently recognizing this problem, and realizing that the main issue, the meaning of the term "entry," is begged by such an argument, appellee is forced to

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C., 2nd S., at p. 32, note, regarding the word "entry," " * * * the term is not precisely defined in the present law," [*i.e.*, the law prior to the enactment of the current 1952 act]. Immediately thereafter they comment, significantly, that "The bill defines the term 'entry' as precisely as practicable, giving due recognition to judicial precedents."

make his second, and fundamental, assumption, on page 52:

> "This definition states the general rule that entry ordinarily is accomplished by coming from a foreign port or place. But in unmistakable language Congress has modified this definition in Sec. 212(d)(7), which declares that its commands relate to aliens who leave Alaska and seek to enter continental United States."

See also, *e.g.*, page 35 of appellee's brief.

Let us examine the definition of entry and determine how "unmistakably" congressional intent is demonstrated. The full definition [subsection 101(a)(13)], quoted in neither of the preceding briefs, is as follows:

> "The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, *except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States* for the purposes of the immigration laws *if the alien proves* to the satisfaction of the Attorney General *that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: Provided,* That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception." (Emp. supp.)

The unmistakable conclusion from the exception to this definition is that voluntary travel to and return from the territories by lawful permanent residents is

not to be considered a departure and reentry. If this interpretation is not adopted, we are forced to the ridiculous conclusion that Congress intended that travel to and return from the territories, whether voluntary or involuntary, is a departure and reentry, while only *voluntary* travel to a foreign country is a departure. In other words, we are asked to believe that a resident alien who is on a sinking ship in the northwest coastal waters of North America will be entitled to return to the mainland unrestricted, if he is fortunate enough to land in Canada, but will be subject to exclusion if he has the misfortune to land in Alaska!

Approaching the same argument from a different angle, if Congress intended the result appellee attempts by his construction of subsection 212(d)(7), there would be no real purpose for the passage of the subsection. The simplest, and clearest way to have expressed such a purpose would have been to have defined the term entry something like the following:

> "The term 'entry' means any coming of an alien into the continental United States, from a foreign port or place, or from an outlying possession, or Hawaii, Alaska, Guam, Puerto Rico, the Virgin Islands of the United States, or any other place under the jurisdiction of the United States, whether voluntary or otherwise, except * * *."

Such a definition would retain the basic definition of an entry, achieve appellee's purpose, and would also obviate the necessity of subsection 212(d)(7).[7] The

[7] In the senate there was a proposed amendment to the definition which, however, far from urging such a change, attempted to extend the exception to include aliens who are "returning after a temporary absence

fact that Congress did not do this, it is submitted, is precisely because the purpose of the subsection is the same as was the purpose of the earlier provision in the 1917 act; a purpose which does not coincide with appellee's interpretation.

The wording of former 8 U.S.C. 137, 39 Stat. 874, is markedly similar to the wording of subsection 212 (d)(7). The pertinent language of the 1917 act was:

> "* * * but if *any alien shall leave* the Canal Zone or any insular possession of the United States and attempt *to enter any other place under the jurisdiction of the United States,* nothing contained in this chapter shall be construed as permitting him to enter under any other conditions than those applicable to all aliens."

The relevant portion of subsection 212(d)(7) reads:

> "The [exclusion provisions] * * * of this section shall be applicable to *any alien* who *shall leave* Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks *to enter*

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in foreign contiguous territory to an unrelinquished domicile in the United States." S. 2550, 82 C., 2nd S., Calendar No. 1072, May 9, 1952, p. 2.

It might be significant to note, in passing, that there was no provision comparable to subsection 212(d)(7) in S. 3455, 81st C., 2nd S., although the definition of entry was present. The provision appeared for the first time in S. 716, 82nd C., 1st S., p. 59; and also appeared in HR 2379 and HR 2816, both 82nd C., 1st S., p. 59. In none of these three bills, however, did the proviso, which is now present in subsection 212(d)(7), appear. It only appeared in the final versions which passed; *i.e.,* S. 2550, 82nd C., 2nd S., and HR 5678, 82nd C., 2nd S. During all these changes, however, the definition of entry remained untouched.

> the continental United States or *any other place under the jurisdiction of the United States* * * *."

The italicized portions are identical. The differences in wording, however, are not significant; *e.g.*, "insular possessions" under the 1917 act included all the territories listed in the 1952 act except Alaska.[8]

S. Rep. 352, 64th C., 1st S., states at page 3, that the 1917 provision was intended:

> " * * * to make it perfectly clear that the admission of an alien to the insular possession does not privilege such alien to come to the mainland without examination. The necessity for the provision is the fact that aliens have been using the insular territory (particularly the Philippines) as a 'stepping stone' to the continent, avoiding close inspection by first securing admission to the Philippines and then coming 'coastwise' to the United States proper."

This statement is a clear recognition of the conditional entry theory adopted in the still earlier case of *Healy v. Backus* (C.A. 9) 221 Fed. 358, which was discussed at pages 19-20 in appellants' opening brief.

In the late forties, the Senate appropriated $335,000.00 for a "full and complete investigation of our entire immigration service." The Immigration Service co-operated fully, and the committee received, among other things, memoranda from various immigration officers regarding their practice and proce-

[8] The addition of Alaska is the only change intended by subsection 212(d)(7), according to S. Rep. 1137, 82nd C., 2nd S., p. 14, and H. Rep. 1365, 82nd C., 2nd S., p. 53.

dure.[9] The result of this project was the massive, 925-page, S. Rep. 1515, 81st C., 2nd S. Under Chapter VIII of Part I, at page 658, the report commented on the problem presented here:

> "Alien residents of the continental United States are not subject to the exclusion provisions of the Act of 1917 when traveling from the continental United States to any of our insular possessions and return."

Appellee's only comment regarding this clear confirmation of appellants' contentions, is:

> "This statement finds no support in any statute, administrative construction, or decision, and appears to be erroneous." (Appellee's Brief, p. 51, footnote 24)[10]

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[9] See S. Rep. 1515, 81st C., 2nd S., pp. 1-3.

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[10] Even if we were to grant that the report erroneously construed prior practice under the 1917 Act, that argument still begs the question, since the report states what Congress thought was the prior practice, and it was this rule that Congress intended by the passage of subsection 212(d)(7): see, S. Rep. 1137, 82nd C., 2nd S., p. 14, and H. Rep. 1365, 82nd C., 2nd S., p. 53. The only contrary interpretation that appellee is able to muster is the very late (1949) administrative decision of *Matter of O'D*, 3 I & N Dec. 632. That case involves actual transit to foreign territory, but does represent a contrary interpretation of the 1917 act. Significant, however, is why this interpretation was only adopted after the lapse of 32 years from passage of the 1917 Act; and, moreover, why was it not communicated to the Senate committee when it was investigating all phases of immigration practice. There is no mention of this interpretation in any of the reports regarding the 1952 Act. Rep. Walter clearly did not agree with such an interpretation, for he stated, as quoted on page 22 of appellants' opening brief, that permanent

The report goes on, however, and again, at page 660, adverts to our problem:

> "An alien resident of the United States, who visits Hawaii and wishes to return to the mainland, is issued a form which shows the port and date of original arrival in the United States, the name of the ship which brought him to the United States, and *the claimed status.* He is not required to present a passport or visa when traveling between the continental United States and any outlying insular possession of the United States or when traveling from one insular possession to another."[11] (Emp. Supp.)

The congressional history upon which appellee relies in order to avoid this meaning, misses the mark, for it all deals with the status of *residents of the territories,* as distinguished from *residents of the mainland,* the status involved in this case.[12]

[11] The report cites former 8 CFR 176.202(g), 12 FR 9987, 9988 regarding the travel documents. Similar, although not identical provisions appear in 8 CFR 211.2(c)(3), 17 FR 11483.

[12] This is true of the quotation from S. Rep. 1515, 81st C., 2nd S., p. 674 (Appellee's Brief, p. 44); the congressional debates and hearings relied on (Appellee's

residents of the United States "can come to the mainland."

Note also, that in the government's brief in *Brownell v. Rubinstein,* October Term, 1953, No. 300, a different attitude to S. Rep. 1515 is reflected. It is there stated: "In the comprehensive 1950 Report of the Senate Committee on the Judiciary (Senate Report 1515, 81st Cong., 2nd Sess.) entitled "The Immigration and Naturalization System of the United States" and *which embodies the congressional understanding of existing law upon which the 1952 Act was predicated,* it was stated * * *." (Emp. supp.)

The only other argument that appellee can muster to avoid the plain meaning of the definition of entry as employed in subsection 212(d)(7) is:

> "Congress was doubtless aware of the close proximity of Alaska to Soviet Siberia and the difficulty of maintaining adequate controls in the vast, sparsely-populated expanses of the Alaska outpost and its adjacent islands."

This argument invites the following statement, also from S. Rep. 1515, 81st C., 2nd S., p. 671:

> "There do not appear to be any serious immigration-control problems which are peculiar to Alaska. Immigration and naturalization problems in Alaska concern naturalization hearings and the delivery of certificates of citizenship."[13]

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[13] In footnote 26, on page 55 of appellee's brief, there is a quotation from H. Rep. 1365, 82nd C., 2nd S., p. 28, to the effect that one of the "basic and significant" changes made by the 1952 act was that it "Provides for a more thorough screening of aliens, especially of security risks and subversives." Immediately following this statement, as parenthetic examples, there appears: "(Secs. 212, 241, and 313)." This addition demonstrates that by "screening" was meant *either exclusion* (covered by section 212) *or expulsion* (covered by section 241). Attention also might be called to the reliance, on page 73, of a 1953 report, which, of course, was written after the passage of the 1952 Act.

Brief, pp. 45-46); the *Report of President's Commission on Immigration* and the *Hearings Before President's Commission on Immigration* (Appellee's Brief, p. 47); and HR 370, S. 952, 83rd C., 1st S. (Appellee's Brief, p. 47), which merely propose to delete Alaska from subsection 212(d)(7). It is also true of the cases of *Matsuda v. Burnett* (C.A. 9) 68 F.(2d) 272; *Sugimoto v. Nagle* (C.A. 9) 38 F.(2d) 207; and *Karamoto v. Burnett* (C.A. 9) 68 F.(2d) 278 (Appellee's Brief, p. 43).

On page 54, appellee states:

> "* * * appellants hardly can escape the reach of the statute whether they are regarded as immigrants or non-immigrants."

This statement appears to miss completely the import of appellants' argument. It assumes that resident aliens must either be immigrants or non-immigrants. Appellants contend, however, that once an alien is lawfully admitted for permanent residence, he ceases to be either an immigrant or a non-immigrant; he becomes a permanent resident, a status which Congress states an immigrant is seeking when he attempts to enter.[14]

Finally, in attempting to circumvent the holding of *Chew v. Colding,* 344 U.S. 590, appellee, on page 57 of his brief, states:

> "Appellants do not refer to the subsequent decision of this Court in *Shaughnessy v. Mezei,* 345 U.S. 206, which described the limited reach of the *Chew* decision. In the *Mezei* case the Court carefully pointed out that 'For the purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not * * *.'"

The *Mezei* case, of course, was a traditional reentry case. The real meaning of the language relied upon by appellee is readily seen when the quote is placed in context, *Shaughnessy v. Mezei,* 345 U.S. 206, 213:

> "In sum, harborage at Ellis Island is not an

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[14] See H. Rep. 1365, 82nd C., 2nd S., pp. 36-37, as quoted on page 15 of appellants' opening brief.

entry into the United States. [citing cases] For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws. [citing cases]

"To be sure, a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process. *Kwong Hai Chew v. Colding,* 344 U.S. 590, 601 * * * ."

Commenting further on the following page in the *Mezei* case, this court stated:

" * * * to escape constitutional conflict we held the administrative regulations authorizing exclusion without hearing in certain security cases inapplicable to aliens so protected by the Fifth Amendment."

Thus, as appellants read the *Mezei* case, it confirmed, rather than limited the holding of the *Chew* case. Moreover, the facts in the instant case are far stronger than those in the *Chew* case, since there has been no travel outside of the territorial limits of the United States.

To conclude (borrowing the words of appellee, at page 56 of his brief):

" * * * we cannot perceive any reasonable basis for departing from the normal, unambiguous meaning of the language used by Congress and embarking on a speculative effort to find another reading, not articulated in the statute and not supported by any indicia of legislative design."

III.

THE PROVISIONS OF SUB-SECTION 212(d)(7) ARE UNCONSTITUTIONAL AS INTERPRETED BY THE COURT BELOW

The basic differences between the parties regarding this point may be summarized fairly simply.

First, the appellants are not contending that they have a vested right to remain in the United States under all conditions. This windmill is fairly well destroyed by appellee's discussion under part A, but the argument misses the essential point: as lawful permanent residents, appellants and those they represent, not only can, but *must,* be expelled, if deemed undesirable. The real dispute is over the power to *exclude* them when they have never left the United States.[15]

Second, under part B of his argument, appellee labors long and hard to establish the power of Congress to regulate the political status of the territories, while conceding "it is manifest * * * that Alaska is not foreign territory" (Appellee's Brief, p. 67). He also concedes that the "Constitution safeguards the 'funda-

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[15] Here, as usual, appellee assumes his conclusion, when he argues, on pages 61-63 of his brief, that Congress has the power to exclude entering aliens. The dispute, however, is whether there can constitutionally be an entry when the alien resident never leaves the territory of the United States. See especially, pages 33-36 of appellants' opening brief.

On page 66, appellee argues that restriction of travel is included in the general power to expel. The power to expel, however, does not, it would seem, include, *e.g.,* the power to sterilize; in other words, the right to travel and work (short of expulsion) is not necessarily an included part of the power to expel.

mental rights of the individual' * * * ."[16] whether the individual resides on the mainland or in the territories (Appellee's Brief, p. 68).

Again, this argument is beside the point, for, as pointed out clearly[17] the issue is the power of Congress to inhibit the travel of lawful resident aliens within the United States in pursuance of their contractual rights of employment. When faced with the real issue, appellee calls upon the war emergency cases, and makes the bold assertion that "even some restrictions upon travel between the states might well be deemed justified" (Appellee's Brief, p. 75).

It is submitted, however, when properly viewing the issues presented by appellants, appellee fails completely (and cannot) answer the constitutional contentions raised.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

A. L. Wirin,
Norman Leonard,
John Caughlan,
Siegfried Hesse,
Counsel for Appellants.

January 1954

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[16] Appellants pointed out in their opening brief that the right to work is one of the most fundamental rights a resident alien has for he "cannot live where * * * [he] cannot work," *Truax v. Raich*, 239 U.S. 33, 42.

[17] Appellants' Opening Brief, pp. 32, 35.

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ADDENDUM

The following has just come to the attention of the Appellants:

1. With respect to the 1917 Immigration Act, predecessor to the 1952 Act (which modifies the 1917 Act, by merely adding Alaska to insular possessions), the following is noteworthy:

On March 19, 1914, the Secretary of Labor, W. B. Wilson, suggested an amendment to HR 6060, which later became the 1917 Immigration Act. As originally drafted, Section 2 of the 1917 Act did not contain the words "or any insular possession of the United States" (following the words *Canal Zone*). This addition was suggested by the Secretary of Labor with the following comment: (S. Doc. 451, 63rd Congress, Second Session):

> "The coming of aliens coastwise to the mainland from the insular possessions—particularly of Asiatic aliens from the Philippine Islands has become a matter of grave concern. It is believed that the simple change in the law here suggested would provide a remedy as under the law so amended, the insular possessions could not be used as a stepping-stone to the mainland by aliens of classes whose entry to the mainland would be regarded by all as undesirable, but whose admission to the Philippines, for instance, might not be considered inadmissible by the authorities in charge of the enforcement of the Immigration laws in those Islands."

The suggestion of the Secretary of Labor was approved, for the following appears in Senate Report 355, 63rd Congress, Second Session:

> "On page 2, line 3, following the words 'the Canal Zone', insert 'or any insular possession of the United States', so as to make it perfectly clear that the admission of an alien to the insular possessions does not

privilege such alien to come to the mainland without examination. The necessity for the provision is the fact that aliens are using the insular territory (particularly the Philippines and Hawaii) as 'stepping-stones' to the continent. (See letter of Secretary of Labor S. Doc. 451, pp. 3-4)."

2. Judicial interpretation of the 1917 Act, is to the effect that it does *not* apply to permanent alien residents of the United States visiting temporarily on insular possessions.

See opinion in *U. S. A. ex rel. Voielr* v. *Savoretti*, U.S. Dist. Ct., So. Dist. Fla., No. 5124 M, Civil, set forth in Appendix A hereto; and Findings of Fact and Conclusions of Law in *Taran* v. *Brownell*, U.S. Dist. Ct., Dist. Col., No. 3494-53, Conclusions of Law No. 2, Appendix B hereto.

Appendix A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

No. 5124-M-Civil

United States of America, ex rel Harry O. Voiler, *Petitioner,*

vs.

Joseph Savoretti, District Director, United States Immigration and Naturalization Service, District No. 6, Miami, Florida, *Respondent*

Court's Opinion

The Court has considered the petition for Habeas Corpus, the Return thereto, and the Traverse to such return.

It appears to the Court that the primary question involved herein is whether the petitioner Voiler made an entry into the United States within the meaning of the Immigration

Act of 1917. I have been cited no authority and am not familiar with any dealing with the precise facts as involved in this case, to-wit: An alien leaving the Continental United States for a trip to an insular possession and return to the Continental United States.

Under Title 8 U.S.C., Section 173, it is expressly provided that any alien leaving the Canal Zone or any insular possession of the United States and attempting to enter the United States shall, in effect, be subject to the same entry provisions as if he came from a foreign country. However, it appears to me that under the definition of "United States" as set forth in the Statute that by going to Puerto Rico the petitioner never did leave the United States and, therefore, his return to the Continental United States did not constitute an entry within the meaning of the Immigration Act.

Petitioner Voiler was not an alien resident in Puerto Rico seeking entry into the Continental United States. He as an alien, resident in the United States, the Continental United States, by his trip to Puerto Rico did not leave the United States. Neither did he as an alien, resident in Puerto Rico, leave Puerto Rico to make entry into the Continental United States. A further fact is pertinent here, he as an alien, resident in the Continental United States, did not leave and go to a foreign country.

In order for a resident alien of the Continental United States to be subject to the entry conditions of the statute, he must remove himself from the United States as defined, including the insular possessions, to a foreign port or place and then return to the United States.

On this ground, and on this ground alone, it is the opinion of the Court that the petitioner should be granted the relief prayed for.

The Court is of the further opinion that all of the other grounds for relief set forth in the petition are not well founded.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3494-53

SAMUEL TARAN, *Plaintiff*,

vs.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, *Defendant*

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed November 24, 1953

This case having come on to be heard upon plaintiff's motion for summary judgment, and the Court having heard oral argument and considered all the pleadings herein, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff, Samuel Taran, is an alien and a native of Russia, who was lawfully admitted to the United States for permanent residence on June 21, 1912.

2. The plaintiff, on or about March 24, 1951, made a trip to Puerto Rico and returned to Miami, Florida, on March 29, 1951.

3. At the time of plaintiff's arrival in Miami on March 29, 1951, he physically presented himself to an Immigration Inspector and was permitted to re-enter Continental United States.

4. At the time of plaintiff's arrival in Miami, Florida, on March 29, 1951, he represented that he originally came from Minnesota.

• • • • • • •

6. Plaintiff did reside in Minnesota for a number of yea 's prior to 1945.

7. On June 21, 1951, the plaintiff was served with a warrant of arrest in deportation proceedings and subsequently ordered deported upon the ground that his arrival from Pueto Rico was an entry within the contemplation of the Immigration laws and that he had entered the United States without inspection.

8. The deportation of plaintiff will result in irreparable damage and injury to him.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the instant action under the Declaratory Judgment Act (22 U.S.C. 2201) and under the Administrative Procedure Act (5 U.S.C. 1001 et seq.).

2. *Plaintiff did not make an entry into the United States within the meaning of the Immigration laws when he returned to the Continental United States from Puerto Rico on March 29, 1951.* (Italics supplied.)

3. Plaintiff is entitled to judgment and an order permanently enjoining the Attorney General of the United States and his subordinates from apprehending or deporting plaintiff upon the theory that he entered the United States from Puerto Rico on March 29, 1951.

(S.) RICHMOND B. KEECH,
United States District Judge.

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3. S. Rep. No. 1515, 81st Cong. 2d sess., so heavily relied on by Appellants herein, (and which the Appellee deems erroneous, is very heavily relied on by the Government in other cases in this Court.

See *Brownell* v. *Rubinstein*, this term, No. 300, Brief for Petitioner, pp. 8, 19, 33, and 35:

> "In the *comprehensive 1950* report of the Senate Committee on the Judiciary (S. Rep. 1515, 81st Cong., 2d Sess.) entitled *The Immigration and Naturalization Systems of the United States*, and which embodies the *Congressional understanding of existing law upon which the 1952 Act was predicated*, it was stated that "Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service." (Italics supplied.)
>
> "The Immigration and Nationality Act of 1952 was preceded by extensive Congressional studies of the pre-existing laws and their operation. The results of these studies are contained in S. Rep. 1515, 81st Cong., 2d Sess., dated April 20, 1950, a report of the Senate Committee on the Judiciary entitled *The Immigration and Naturalization Systems of the United States.* This report appears to constitute the Congressional understanding of the prior law upon which the 1952 Act was predicated."
>
> "This conclusion finds authoritative support in S. Rep. 1137 which left the review of deportation orders to "existing law," *which was carefully defined in the foundation S. Rep. 1515* as precluding judicial review except in habeas corpus proceedings." (Italics supplied.)

And in *Shaughnessy* v. *Mezei*, October Term, 1952, in its Brief for the Petitioner deemed the Report as reflecting an "exhaustive investigation of our immigration laws *and practices* . . ." (p. 25). See also, *Shung* v. *Brownell*, this term, No. 241, Brief for the Respondent, p. 36; and *Heikkila* v. *Barber*, October Term, 1952, No. 426, Brief for the Appellee, p. 32.

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CITATIONS

Cases—Continued

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 195

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 37, ET AL., APPELLANTS

v.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE APPELLEE

ORDER BELOW

The opinion of the specially convened three-judge District Court is reported in 111 F. Supp. 802 (R. 7).

JURISDICTION

The order of the District Court dismissing the complaint was entered April 10, 1953 (R. 14). A motion for rehearing was filed April 20, 1953 and was denied by order of the Court entered April 21, 1953 (R. 14, 15). The petition for appeal was filed in the District Court on June 22,

1953 (R. 15), and was allowed the same day by order of the District Court (R. 17). On October 12, 1953 this Court directed that jurisdiction be postponed to the hearing of the case on the merits and requested appellants to discuss on brief and oral argument the right of the union to sue for injunction upon behalf of its members (R. 20). Jurisdiction of this Court to review on direct appeal the judgment of the District Court denying the injunction prayed for and dismissing the complaint is invoked under 28 U. S. C. 1253 and 2101 (b).

QUESTIONS PRESENTED

1. Whether this appeal presents a controversy cognizable by this Court.

a. Whether appellant union, not directly reached by the statute, has standing to challenge its constitutionality merely because some members of the union are aliens who eventually may be affected by enforcement of the statute.

b. Whether the controversy is justiciable since there is no allegation that any effort has yet been made to enforce the terms of the statute against appellants or any individuals they purport to represent.

c. Whether the Attorney General is a necessary party since he is charged with enforcement of the statute throughout the United States.

d. Whether enforcement of the statute can be challenged except in habeas corpus proceedings.

2. Whether Section 212 (d) (7) of the Immigration and Nationality Act of 1952 requiring aliens arriving from Alaska to qualify for admission is properly interpreted as applying to aliens who have established legal residence in continental United States and are returning from a temporary visit to Alaska.

3. Whether the section so construed is constitutional.

STATUTES INVOLVED

In Section 212 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U. S. C. A. 1182 (a), Congress has provided that:

> Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: * * *.

This subsection then proceeds to list 31 categories of inadmissible aliens, including those deemed objectionable for subversiveness, criminality, and physical or mental afflictions.

Section 212 (d) (7) of the Immigration and Nationality Act, 66 Stat. 188, 8 U. S. C. A. 1182 (d) (7), specifies additionally:

> The provisions of subsection (a) of this section, except paragraphs (20), (21), and (26),[1] shall be applicable to any alien who

[1] Paragraphs (20) and (21) relate to the documents that must be presented by aliens seeking permanent admission as immigrants; paragraph (26) describes the documents for aliens seeking temporary admission as nonimmigrants.

shall leave Hawaii, Alaska, Guam, Pue
Rico, or the Virgin Islands of the Uni
States, and who seeks to enter the co
nental United States or any other place
der the jurisdiction of the United Stat
Provided,[2] That persons who were admit
to Hawaii under the last sentence of sect
8 (a) (1) of the Act of March 24, 1934,
amended (48 Stat. 456), and aliens w
were admitted to Hawaii as nationals
the United States shall not be excepted
this paragraph from the application
paragraphs (20) and (21) of subsecti
(a) of this section, unless they belong
a class declared to be nonquota immigra
under the provisions of section 101
(27) of this Act, other than subparagra
(C) thereof, or unless they were admit
to Hawaii with an immigration visa. T
Attorney General shall by regulations p
vide a method and procedure for the te
porary admission to the United States
the aliens described in this proviso. A
alien described in this paragraph, who
excluded from admission to the Uni
States, shall be immediately deported
the manner provided by section 237 (a)
this Act.

STATEMENT

This action was brought by International Lo
shoremen's and Warehousemen's Union, Local
and by its president and business agent on beh

[2] This proviso relates primarily to Filipino laborers
mitted to Hawaii under limited passports.

of all members of the union who are aliens lawfully residing in the United States (R. 1 and 2). The two officers and one member, who joined as a petitioner, were themselves aliens. They sought an injunction restraining respondent, the District Director of the Immigration and Naturalization Service at Seattle, Washington, from interpreting and enforcing Section 212 (d) (7) of the Immigration and Nationality Act of 1952 against the alien members of the union who wished to go to Alaska to engage in seasonal employment. At the request of appellants a three-judge court was convened (R. 7).

The issues were crystallized in a pretrial order to which the parties agreed (R. 1). At the hearing before the three-judge court no evidence was offered other than the agreed facts recited in the pretrial order and in the exhibits attached to it (R. 7).

It appears that the union is composed of over 3,000 persons who work every summer in the herring and salmon canneries of Alaska. Appellants Mensalvas and Mangaoang are the president and business agent of the union, respectively, and with the union seek to maintain the action on behalf of alien members of the union lawfully resident in the United States (R. 1 and 2). Bonilla, an alien member of the union, is a third individual appellant. Two other individual petitioners, Little and Tallido, were alleged to be citizens and they are not appellants here. The

union alleges that it has entered into collectiv
bargaining agreements, on behalf of its member
for employment in the salmon and herring can
ning industry in Alaska and that if members o
the union who are lawful permanent residen
aliens are excluded upon their return to Seattl
from Alaska after the 1953 canning season, thei
property rights in the union and their contrac
rights as members of the union will be jeopardize
and forfeited (R. 2).

It is also alleged that respondent, in interpre
ing Section 212 (d) (7) of the Immigration an
Nationality Act of 1952, has concluded that a
alien members of the union who are lawful pe
manent residents of the United States and who g
to Alaska from Seattle and return to continenta
United States at Seattle will be subject to exclu
sion if they are found inadmissible under th
requirements of the immigration laws (R. 2 an
3). The agreed facts also set forth the procedu
that would be invoked when such aliens retur
from their stay in Alaska, which would includ
inspection by immigration officers, detention fo
further inquiry of those whose admissibility ap
peared doubtful, determination of admissibility b
a special inquiry officer at a hearing, appeal t
the Attorney General from an adverse decision o
the special inquiry officer, and the right to co
lateral review by habeas corpus proceedings in th
event the decision ultimately went against th
aliens involved (R. 3). Finally, it is alleged tha

deportation orders have been entered against appellants Mensalvas and Mangaoang and against three other alien members of the union not parties to the action,[3] which they are challenging by administrative or judicial process, "that they all intend to travel to Alaska this summer in pursuance of their employment rights; and that this employment, pursuant to the contract rights specified above, constitutes the source of a substantial portion of their yearly income" (R. 6).

The agreed issues of law outlined in the pretrial order related to the jurisdiction of the court, the interpretation of the statute, and the constitutionality of such interpretation (R. 4). In its per curiam opinion dated April 10, 1953, the three-judge court found that the court could entertain an action testing whether an officer was acting beyond his statutory authority "and the declaratory judgment, together with an enforcing injunction, furnishes a proper device to test the scope of this authority." (R. 11). The court then found that Section 212 (d) (7) was properly construed as applying to resident aliens returning to continental United States from Alaska, pointing out that the statute "in plain and simple words" relates to "any alien" and that:

> We cannot escape the obvious meaning of the language used. The words "any alien"

[3] Those proceedings do not involve the question here at issue since they are not based on an entry from Alaska.

include aliens situated as are those here involved. [R. 12.]

Finally, the court rejected the constitutional attack, stating that "the vast and broad powers of Congress" to legislate in regard to the admission or expulsion of aliens overbalanced and overcame the limited constitutional protections afforded to resident aliens. The court found no constitutional limitation which precludes Congress from adopting similar classifications, for the purpose of exclusion, in dealing with lawful resident aliens seeking to reenter continental United States from a territory of the United States and from a foreign country. (R. 13–14).

SUMMARY OF ARGUMENT

I

Jurisdiction of the subject matter and parties is lacking for four enumerated reasons, some of which involve similar considerations.

First, the union cannot maintain this suit, since it is not the real party in interest. No statute is being enforced against it, directly or indirectly. No right of the union is being violated or threatened. The complaint relates only to the rights of individual members of the union who may wish to go to Alaska. The union derives no right from them to attack the statute.

Second, the controversy is not justiciable. Under the Constitution the federal courts decide only cases and controversies. No action under

the statute has yet been taken against appellants. Nor is there any certainty that any of the appellants ever will be subjected to the mandates of the statute. It appears therefore that appellants are soliciting an advisory ruling in a hypothetical, not an actual, case. This is not a justiciable controversy under the Constitution. Indeed, that was the direct holding in *United Public Workers* v. *Mitchell,* 330 U. S. 75, in which the facts were closely analogous.

Third, the action must fail because of the absence of an indispensable party, the Attorney General. In *Williams* v. *Fanning,* 332 U. S. 490, and *Hynes* v. *Grimes Packing Co.,* 337 U. S. 86, this Court found that a subordinate officer could be sued if the controversy was localized and the relief sought would expend itself on him. Here the relief cannot be effectively granted by an order against the respondent District Director alone, since the decision on entry is delegated to other officials and any action by him would not be binding on any other District Director, or on the Commissioner of Immigration and Naturalization and the Attorney General. Under the statute and regulations all responsibility resides in the Attorney General, and the power of decision is exercised on his behalf by special inquiry officers, subject to final decision on appeal by the Board of Immigration Appeals, sitting in Washington, D. C. Virtually all the cases in the lower courts have concluded that the Attorney General is an

indispensable party to an action seeking to review an order of deportation. *E. g., Paolo* v. *Garfinkel,* 200 F. 2d 280 (C. A. 3).

Fourth, the remedy is inappropriate. In *Heikkila* v. *Barber,* 345 U. S. 229, this Court held that habeas corpus is the exclusive remedy to review an order of deportation. That conclusion has just been reaffirmed, in relation to an exclusion order, in *Tom We Shung* v. *Brownell,* decided December 7, 1953. If habeas corpus remains the exclusive method of review under the 1952 Act, the point at issue in *Brownell* v. *Rubinstein,* No. 300, this Term, then the anticipatory relief sought in this action is improper. Moreover, habeas corpus would resolve the immediate issues raised in this proceeding, and thus affords a complete remedy.

II

The merits will be reached only if all these jurisdictional attacks fail. Before examining the question of constitutionality, it will be necessary to determine whether the statute properly is construed as applying to alien residents of the United States returning from a temporary visit to Alaska. Sec. 212 (d) (7) of the Immigration and Nationality Act applies the excluding provisions of the immigration laws to "any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United

States." The previous statute had a similar provision relating to arrivals from insular possessions. The principal change effected by the 1952 Act was the extension of these requirements to entries from Alaska.

Restrictions against entries from insular possessions have been enforced, without any successful challenge, for 50 years. In the studies which preceded the 1952 Act Congress considered the feasibility of ending them. Instead, they were retained and enlarged by the inclusion of Alaska. Efforts were made to eliminate Sec. 212 (d) (7) on the floor of the House of Representatives, but the amendment was voted down. The debate indicates that Congress was impressed with the need for providing a screening process to prevent the free movement of subversives from the territorial possessions to continental United States.

There is nothing in the language of Sec. 212 (d) (7) or its history to support a thesis that it was not intended to control alien lawful residents returning to continental United States from a territory in the same way that the Act applies to resident aliens who go abroad to a foreign place. And there can be no warrant for changing the unambiguous, unqualified language of the statute. Morever, it seems evident that Congress did not contemplate a limited reading.

Resident aliens who leave the United States voluntarily never have been deemed to have a vested right to return. Numerous decisions of

this court have held that a returning resident alien is subject to all the exclusions of the immigration laws when he seeks to reenter. *The Chinese Exclusion Case,* 130 U. S. 581; *Lem Moon Sing* v. *United States,* 158 U. S. 538; *Polymeris* v. *Trudell,* 284 U. S. 279; *Shaughnessy* v. *Mezei,* 345 U. S. 206. Sec. 212 (d) (7) should be read in the light of these holdings, as one element in an overall legislative design to bar objectionable alien residents who seek to return to the United States. For the purposes of this statute Congress assimilated Alaska to a foreign country. Although the explicit directions of the statute eliminate any need for fathoming the legislative purpose, it seems evident that in applying this restriction to travel from Alaska, Congress deemed that aliens guilty of subversion and criminality in the United States may be more objectionable than those coming from abroad. Congress doubtless also was aware of the exposed situation of Alaska, its proximity to Soviet Siberia, and the fact that aliens coming from Alaska must journey hundreds of miles before coming to continental United States.

Chew v. *Colding,* 344 U. S. 590, seems entirely inapplicable. There this Court merely concluded that under the circumstances of that case it was unfair to deny a hearing. The limited holding of that case was described in *Shaughnessy* v. *Mezei,* 345 U. S. 206.

III

As so construed, the statute is constitutional. The privilege of entering or remaining in the United States can not be characterized as a vested interest, entitled to protection under the Constitution. On the contrary, numerous decisions of this court have concluded that Congress has sovereign power to determine which aliens shall be permitted to enter the United States and which shall be permitted to remain, and that the courts cannot reexamine such political determinations. The controlling principles were reviewed and reaffirmed in *Harisiades* v. *Shaughnessy,* 342 U. S. 580 and *Shaughnessy* v. *Mezei,* 345 U. S. 206. The latter case also confirmed many previous decisions which supported the exclusion of resident aliens seeking to return from a temporary absence. The fullness of the legislative power over the subject precludes any contention that its exercise by Congress has deprived an alien of a vested interest without due process of law.

There is nothing in the Constitution which prevents the exercise of this complete power in regard to aliens seeking to enter continental United States from Alaska. Although Alaska is an organized territory, it is not yet a state of the Union. While Alaska concededly is not foreign territory, there is no reason why it must be treated as part of the United States for every legislative purpose. As a territory, the provisions

of the Constitution safeguarding "fundamental" rights are applicable. But no "fundamental" right to travel from Alaska to continental United States can be claimed by aliens.

So long as Alaska remains a territory, it remains subject to the plenary control of Congress, under Art. IV, Sec. 3, cl. 2 of the Constitution. *Alaska* v. *Troy,* 258 U. S. 101, directly sanctions the establishment of special controls for commerce and travel from Alaska.

Even if it is assumed that the reasonableness of the classification can be examined in this case, the classification clearly is reasonable. It stems from the Congressional concern with alien subversives, its desire to limit their mobility, and with its feeling that screening is needed because of Alaska's special situation, particularly its proximity to Soviet Siberia.

ARGUMENT

I

The Court lacks jurisdiction over the subject matter and the parties

The cause of action urged by appellants suffers from a number of infirmities which preclude the grant of relief. We believe that the union may not properly maintain this action, that the controversy is not a justiciable one at this stage since no action has been taken against appellants, that the Attorney General is a necessary party, and that appellants have misconceived their remedy.

A. The union cannot maintain this suit

In attempting to vindicate alleged personal rights of its alien members under the federal immigration statute and under the Federal Constitution, we believe the union has misconceived its function. The individual members of a union doubtless are subject to the impact of many different laws. To assert that a union may bring suit to test the validity of such legislation, like a mother hen sheltering her flock, seems to us to distort the role of the union as the representative of its members in dealing with their employers. Moreover, it exposes limitless possibilities of litigation brought by "protectors" of others, instituted and conducted without the knowledge or participation of the supposed beneficiaries and in which such beneficiaries will not necessarily be bound by the conclusions reached. Such a concept seems utterly foreign to every requirement of orderly jurisprudence.

While there now is no doubt that a union has capacity to sue and be sued in the federal courts,[4] the union is not a proper party to this contro-

[4] At common law an unincorporated association had no capacity to sue, unless a specific right of action was conferred by statute. *Moffat Tunnel League* v. *United States*, 289 U. S. 113. However, this preclusion has been modified by court decisions and by statute. *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; Rule 17 (b), Federal Rules of Civil Procedure; Section 301 (b), Labor Management Relations Act of 1947, 29 U. S. C., Supp. V, 185 (b); *I. L. W. U.* v. *Juneau Spruce Corp.*, 342 U. S. 237, 241.

versy. The union as such is not here involved. It is not an alien. No statute or regulation is or will be enforced against it. It will not leave the United States and be faced with the possibility of exclusion in seeking to return.

A suit must be brought by the real party in interest. Rule 17 (a) of the Federal Rules of Civil Procedure provides:

> Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; * * *.

Many cases have established that in order to qualify as "the real party in interest" a plaintiff must demonstrate that he has a direct, legal interest in the outcome of the litigation, and courts have dismissed attempts to sue by persons whose interest was remote, indirect, speculative, and sentimental. *Tyler* v. *Judges of the Court of Registration,* 179 U. S. 405; *Moffat Tunnel League* v. *United States,* 289 U. S. 113; *Toomer* v. *Witsell,* 334 U. S. 385; *Consolidated Gas Co.* v. *Newton,* 256 Fed. 238 (S. D. N. Y.), affirmed, 260 Fed. 1022 (C. A. 2), certiorari denied, 250 U. S. 671; *Walling* v. *Miller,* 138 F. 2d 629 (C. A. 8). In the

Moffat Tunnel League case this Court found that an association was not the real party in interest in attempting to sue on behalf of its members, and observed, 289 U. S. at 119:

> Consequently the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. [Citing cases.] Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one. *It is no more than a sentiment,* such as may be entertained by members of the public * * *. [Emphasis added.]

Manifestly this mandate governs actions which question the constitutionality of a statute. One who attacks the statute must show that he is directly affected. Thus this Court declared in *Heald* v. *District of Columbia,* 259 U. S. 114, 123:

> It has been repeatedly held that one who would strike down a * * * statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him. [Citing cases.]

See also *Premier-Pabst Sales Co.* v. *Grosscup,* 298 U. S. 226; *Barrows* v. *Jackson,* 346 U. S. 249; *In re George F. Nord Bldg. Corp.,* 129 F. 2d 173 (C. A. 7), certiorari denied, *sub nom. Kausal* v. *79th and Escanaba Corp.,* 317 U. S. 670.

Special provision is made for so-called class actions in Rule 23 (a) of the Federal Rules of

Civil Procedure, which authorizes in certain enumerated situations the maintenance of representative suits:

> If *persons constituting a class* are so numerous as to make it impracticable to bring them all before the court, *such of them,* one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued * * *. [Emphasis added.]

This rule is a codification of earlier equitable doctrines. 6 *Cyclopedia of Federal Procedure* (3d ed., 1951) 660. It does not give an unlimited right of representation but merely specifies the conditions under which a representative suit may be maintained. One of those conditions is that the person prosecuting the suit must be a member of the class. Another is that he must be a real party in interest within the mandate of Rule 17. *Id.* pp. 667, 669; 2 Barron and Holtzoff, *Federal Practice and Procedure* (1950) 6, 8. Local 37 is not an alien and therefore not a member of the class it seeks to represent.

Where the union has no direct interest, its solicitude for the welfare and the civil rights of its members will not entitle it to volunteer protection for such rights through litigation. Only the individuals whose rights allegedly are being infringed are proper parties to such a suit. Thus in *Hague* v. *C. I. O.,* 307 U. S. 496, a union and individual members sued to restrain alleged interference with

constitutional rights. The Court found that the issues raised in the proceeding touched the individual constitutional rights of the members and that "only the individual respondents may, therefore, maintain this suit."[5] 307 U. S. at 514.

In *Milk Wagon Drivers' Union* v. *Associated Milk Dealers,* 39 F. Supp. 671, 672 (N. D. Ill.), a union sued milk dealers in Chicago to recover back wages on behalf of the members. The court held that the union was not a party in interest and could not sue on behalf of its members. The court stated:

> This is not a proper class action. Each milk wagon driver has his individual claim which he is entitled himself to prosecute. It would be a strange situation indeed if some one else, either labor union or labor union officer, were permitted to institute an action embodying the claims of perhaps thousands of individuals and they, without ever knowing such an action was instituted, were to be bound by the result of that suit.

The court cited *Hansberry* v. *Lee,* 311 U. S. 32, in which the limitations of class suits are described.[6]

[5] The American Civil Liberties Union likewise was held not to be a proper party.

[6] In *United Public Workers* v. *Mitchell,* 330 U. S. 75, a union sought to join with its members in an action to protect their constitutional rights. The lower court, although apparently doubtful of the union's standing to sue, did not find it necessary to pass on this issue, holding that the in-

It seems manifest, in the light of these precep
that the union here is not the real party in i
terest. The union apparently is motivated by
benevolent concern for the welfare of some of
members. Obviously if only two members of t
union were aliens, the union could not claim th
its interest would be affected. The fact that
this particular case, there may be a somewh
larger number of alien members does not alt
the situation. It is still clear that the union
such in its collective capacity has no direct i
terest in this suit. Appellants "are not the cha
pions of any rights except their own." *Henn
ford* v. *Silas Mason Co.*, 300 U. S. 577, 583. Ea
aggrieved alien member is fully competent to ta
advantage of any remedies that may be availabl

The union's allegations of rights in additi
to those of its members do not improve its stan
ing to sue. It is said that the union has a co
tract with Alaskan canneries and wishes its ali

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dividual plaintiffs had a cause of action. 56 F. Supp. 6
624 (D. C.). The union's status was neither questioned n
determined in this Court. 330 U. S. at 82, Note 10. Howev
the reasoning of the prevailing opinion in that case appears
exclude any standing to sue on the part of the union. S
pp. 25–27, *infra*.

[7] In appellants' brief it is stated that twelve exclusion pr
ceedings are pending against members of the union. Ea
of these will be able to test his rights in the exclusion pr
ceeding and, if unsuccessful, will be able to bring habe
corpus proceedings. The brief does not specify that any
appellants are involved in such exclusion proceedings. S
note 9, *infra*, p. 24.

members to have a share in fulfilling that contract. But this tangential concern is not a legal interest. There is no showing that any measure is aimed at the union or that it has suffered or will suffer any deprivation. Indeed, there is no suggestion that it has been or will be unable to meet any commitments on its contracts.

None of the authorities cited by appellants is relevant. *Buchanan* v. *Warley,* 245 U. S. 60, was a suit for specific performance, contested on the ground that the contract was void as offending a local ordinance prohibiting sale to Negroes. The Court agreed that an attack on constitutionalty must be "made by those whose rights are directly affected by the law or ordinance in question." (p. 72). However, the court found that: "In this case the property rights of the plaintiff in error are directly and necessarily involved" (p. 73).

Pierce v. *Society of Sisters,* 268 U. S. 510, held that a private school had standing to challenge the constitutionality of a statute compelling attendance in public schools, on the ground that its interests were directly affected. The Court stated: "Their interest is clear and immediate" (p. 536).

In *Truax* v. *Raich,* 239 U. S. 33, the law required the employer to discharge alien employees. The employee was held a proper party in a suit to enjoin enforcement, and the Court pointed out that unless the suit was allowed he would be without adequate remedy. The Court also observed, 239 U. S. at 39:

> It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting of the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote.

In *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, the control over the members of the association was imposed by reason of their membership in the organization whereas here membership in the union has no relation to the question at issue. Moreover, in that case the results on the association were found to be immediate and direct whereas here they are remote and indirect.

And in *Barrows* v. *Jackson,* 346 U. S. 249, the Court approved the "salutary rule" that only the person directly affected could question constitutionality, but found "unique" circumstances requiring the award of relief to prevent the enforcement of contracts in violation of the Constitution.

None of these cases, and none we have encountered, has endorsed an attack on the constitutionality of a statute by a party against whom the statute is not enforced, directly or indirectly, and where the persons directly affected are fully able to defend their own rights.

Nor is there any substance in the claim that there has been a waiver of the objection to suit by the union (App. Br. p. 13). This claim runs counter to Rule 12 (b) of the Federal Rules of

Civil Procedure which provides that the defense of "failure to state a claim upon which relief can be granted," the defense of "failure to join an indispensable party" are not waived by failure to move before trial. There is no claim here that the union lacks legal capacity to sue. Cf. *McCandless* v. *Furlaud,* 293 U. S. 67. On the contrary, the objection is that relief cannot be granted on the union's claim. This objection was actually raised in the court below by the contention that the complaint did not state a cause on which relief could be granted.[8]

B. This is not a justiciable controversy

In the preceding section of the brief we have pointed out the reasons we believe that the Union is not a proper party to this action. As is pointed out above, *supra,* p. 5, three individual aliens, two of whom are officers of the Union and one a member, joined as petitioners. In this, and the two succeeding sections, we shall deal with reasons why this suit may not be maintained by the individual petitioners, or the Union.

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[8] There is a possibility that the controversy is moot. Although the record indicates that the members of the appellant union "work every summer in the herring and salmon canneries of Alaska" (R. 1, Fdg. II), the remainder of the findings referred to the intention to go to Alaska and return in 1953 only (R. 2, Fdg. VII; R. 6, Fdg. IX) and the union agreement attached as an exhibit to the findings is for the year 1952 only (R. 5). Therefore, it may be that, since the summer of 1953 is past, the controversy has become moot.

In seeking to enjoin the enforcement of Section 212 (d) (7) of the Immigration and Nationality Act of 1952 and to declare their rights under that statute, appellants are anticipating interpretation and enforcement of a statute to which they have not yet been subjected. We have pointed out already that this statute never can be aimed at the union, so that it cannot urge any solid basis for maintaining this suit (p. 16). And the mandate of the statute concededly has not yet been directed against any of the individual appellants.[9] Nor is there any certainty that it ever will be. The court cannot be asked to speculate that the individual appellants ever will leave the continental United States. Nor can it conjecture that they will be excluded if they seek to return.

It seems clear that appellants solicit an advisory determination on a hypothetical case that may never materialize as to them. The aid of the federal courts cannot be enlisted to resolve such inquiries, for under the Constitution the courts

[9] See note 7, *supra*, which refers to the statement in the brief of appellants that twelve members of the union, among whom apparently are none of the appellants, are involved in exclusion proceedings in attempting to return to continental United States from Alaska. For a summary of the official records of the Immigration Service describing the status of these and all other cases in the respondent's District which involve aliens returning from Alaska, see report of the District Director to the Commissioner of Immigration and Naturalization set forth in the Appendix, *infra*, p. 76.

can adjudicate only cases or controversies. U. S. Constitution, Article III, Section 2.

The authorities overwhelmingly reject the notion that appellants can contest the validity of statutory provisions to which they have not yet been subjected, and may never be. Indeed, one decision of this Court seems directly in point. In *United Public Workers* v. *Mitchell,* 330 U. S. 75, a union and a group of its members sought declaratory relief and an injunction to restrain the enforcement of the so-called Hatch Act. They too assailed the statute as unconstitutional. However, the provisions of the statute were being enforced against only one of the individual plaintiffs. The others feared that its commands would be applied to them if they embarked on certain anticipated action. Only the single plaintiff directly affected was found to have any standing in court. The action brought by the union and the other individual plaintiffs was dismissed because it did not present a justiciable controversy. The court pointed out, 330 U. S. at 88: "They declare a desire to act contrary to the rule against political activity but not that the rule has been violated." The language of the opinion seems decisive in disposing of the instant proceeding, 330 U. S. at 89–91:

> As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional

issues, "concrete legal issues, presented in actual cases, not abstractions," are requisite. This is as true of declaratory judgments as any other field. These appellants seem clearly to seek advisory opinions upon broad claims of rights protected by the First, Fifth, Ninth and Tenth Amendments to the Constitution * * * the facts of their personal interest in their civil rights, of the general threat of possible interference with those rights by the Civil Service Commission under its rules, if specified things are done by appellants, does not make a justiciable case or controversy. * * *

The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interference upon the other.

The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired. Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches. By these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority. No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and the regulations.

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Among the many authorities which contain similar expressions are *Federation of Labor* v. *McAdory,* 325 U. S. 450, 461; *Coffman* v. *Breeze Corps.,* 323 U. S. 316, 324; *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 239–41; *Massachusetts* v. *Mellon,* 262 U. S. 447.

The present case seems virtually indistinguishable from *United Public Workers* v. *Mitchell.* Here too the union and its members are advancing constitutional challenges leveled against a statute in advance of its actual application to any of them. Here too the controversy is speculative and hypothetical. Here too the appellants cannot be awarded the advisory ruling they seek.

The effect, of course, of permitting a suit to be tried in court before it has been commenced administratively or followed its natural course through administrative proceedings, is to shift burdens to the courts which Congress intended to be resolved in the first instance by the special procedures it provided. Basically the issue is not dissimilar to the exhaustion of administrative remedies doctrine expressed by this Court in *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 50–52, or *Macauley* v. *Waterman Steamship Corp.,* 327 U. S. 540, 544. Its application to immigration cases is described in *United States* v. *Sing Tuck,* 194 U. S. 161. If the individuals involved are administratively found not to be covered by the Act, or for some other reason the anticipated controls are not imposed, it will

then be unnecessary to reach the more substantial constitutional issues involved. *Aircraft and Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 772. But if, on the other hand, the result of the administrative proceeding is adverse to the individual involved, the case reaches the courts in a definite form, with findings of fact and expert interpretations which narrow and eliminate extraneous issues. Therefore, it would seem appropriate to require appellents to complete the administrative process before soliciting the aid of the courts.

The cases cited by the court below hardly support its finding that the controversy was justiciable. *United States Lines Co.* v. *Shaughnessy,* 195 F. 2d 385 (C. A. 2) surveyed action that had been taken in fourteen actual cases in which the steamship company had been ordered to pay detention expenses for seamen arriving on its vessels. The controversy was thus real, not hypothetical. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, likewise confronted concrete action in listing the complaining organizations as subversive. The Court emphasized that it was granting "relief to parties whose *legal rights have been violated* by unlawful public action * * *." (Emphasis added.) 341 U. S. 141.

Here no rights have been violated, but it is alleged that appellants anticipate such a violation in the event they journey to Alaska. No case cited by appellants or by the court below, and none we have found, ever has deemed that such

an apprehension is justiciable. On the contrary, *United Public Workers* v. *Mitchell, supra,* on closely analogous facts, directly refutes the supposition that the court can grant such a speculative, advisory decree.

Appellants are in no better position to maintain their suit by reason of the fact that they ask for a declaratory judgment. The declaratory judgment process is governed by substantially the same jurisdictional restrictions as other litigation brought in the federal courts. Indeed, the statute itself counsels that the remedy can be invoked only in "a case of actual controversy." 28 U. S. C. 2201. The purpose of this reservation is to confirm the constitutional limitations denying access to the courts until the development of a case ripe for adjudication. Like other forms of action, the declaratory judgment suit cannot be utilized to obtain an advisory decree.

Thus, in *Federation of Labor* v. *McAdory,* 325 U. S. 450, 461, the Court declared:

> The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. * * * This Court is without power to give advisory opinions. * * * It has long been its considered practice not to decide abstract, hypothetical or contingent questions * * *or to decide any constitutional question in advance of the necessity for its decision * * *. [Citing many cases.]

And in *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 239–40, Chief Justice Hughes similarly observed that the Declaratory Judgment Act "manifestly has regard to the constitutional provisions and is operative only in respect to controversies which are such in the constitutional sense."

The holdings of this Court thus emphatically demonstrate that this case must fail because it does not present a justiciable controversy. The appellants will have ample opportunity to challenge the validity or interpretation of the statute when, and if, its mandates are sought to be applied to them.[10]

C. The Attorney General is an indispensable party

This action is brought against a subordinate official of the Department of Justice. It attacks a statute being enforced throughout the United States. We believe the suit must fail because of the absence of an indispensable party, the Attorney General. If his participation in the litigation

[10] The remoteness of any actual controversy is revealed by the nature of the determination sought to be reviewed as reflected in the exhibits attached to the pretrial order (R. 5). While these exhibits were not reproduced in the record, they are on file in the office of the Clerk of this Court. They show that the "determination" actually consisted of a newspaper article, a press release, and a memorandum discussing generally changes effected by the new law. All of these documents were issued before the present law became effective, December 24, 1952. None involved an actual case. See note 11, *infra*, p. 35.

is requisite, the court in Seattle has no jurisdiction, since the Attorney General can be sued only in the District of Columbia, where he has his official residence. *Blackmar* v. *Guerre,* 342 U. S. 512; *Connor* v. *Miller,* 178 F. 2d 755 (C. A. 2).

In *Williams* v. *Fanning,* 332 U. S. 490, this Court attempted to formulate rules to clarify the conditions under which a subordinate officer might be sued. In that case suit was brought against the postmaster at Los Angeles to restrain enforcement of a mail fraud order of the Postmaster General directed against a person doing business in Los Angeles. The Court held that the subordinate officer was properly sued and that the test was (332 U. S. at 494) whether:

> the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court. It seems plain in the present case that that will be the result even though the local postmaster alone is sued. It is he who refuses to pay money orders, who places the stamp "fraudulent" on the mail, who returns the mail to the senders. If he desists in those acts, the matter is at an end. That is all the relief which petitioners seek. The decree in order to be effective need not require the Postmaster General to do a single thing * * *.

This holding was elaborated in *Hynes* v. *Grimes Packing Co.,* 337 U. S. 86, 97. The suit was brought against the regional director of Fish and

Wildlife Service to enjoin an order of the Secretary of Interior prohibiting commercial fishing in certain areas in Alaska. The Court found the Secretary of the Interior not an indispensable party and observed:

> Nothing is required of the Secretary; he does not have to perform any act, either directly or indirectly. Respondents merely seek an injunction restraining petitioner from interfering with their fishing. No affirmative action is required of petitioner, and if he and his subordinates cease their interference, respondents have been accorded all the relief which they seek. The issues of the instant suit can be settled by a decree between these parties without having the Secretary of the Interior as a party to the litigation.

On the other hand, in *Blackmar* v. *Guerre, supra,* the members of the Civil Service Commission were held to be necessary parties to an action which would have involved affirmative action on their part. See also *Money* v. *Wallin,* 186 F. 2d 411 (C. A. 3), certiorari denied, 341 U. S. 935. The instant case falls within the rationale of the *Blackmar* case.

In the *Williams* and *Hynes* cases, all the parties affected, as well as the subject matter of the controversy, and the officer charged with immediate responsibility for executing the order were in the district where the action was brought. The dispute thus had a localized situs and the local

court was in a position to settle the controversy. That is not the situation here. The relief sought cannot "expend itself" on the District Director, and the matter will not be "at an end". Nor can it be said that the decree will be "effective" or that the issues "can be settled" by such a decree. Therefore, we believe the *Williams* and *Hynes* cases inapplicable.

Here the statute gives the Attorney General the power to administer and enforce its terms. Sec. 103 (a), Immigration and Nationality Act of 1952, 8 U. S. C. A. 1103 (a). The Commissioner of Immigration and Naturalization is charged with responsibilities and authorities conferred upon and delegated to him by the Attorney General. *Id.*, Sec. 103 (b). Special inquiry officers are empowered to hear and determine exclusion and deportation proceedings, and are given delegated authority to take certain actions for the Attorney General. Secs. 236 and 242, Immigration and Nationality Act of 1952, 8 U. S. C. A. 1226 and 1252; 8 CFR (1952 rev.) 236.1. Appeals from orders of special inquiry officers are taken to the Board of Immigration Appeals, sitting in Washington, D. C., which has full authority to act on behalf of the Attorney General in deciding appeals from decisions of special inquiry officers in exclusions and deportation cases. 8 CFR (1952 rev.) 6.1 (b).

With respect to the admission of aliens, the sole function of the District Director and the offi-

cers under his control is to examine aliens seeking to enter and detain for further inquiry any alien whose right to land does not appear clear and beyond a doubt. Sec. 235 (b), Immigration and Nationality Act of 1952, 8 U. S. C. A. 1225 (b). Once the alien is detained for further inquiry, the District Director has no responsibility for, or participation in, the process of making a determination on his right to enter.[11] See *Statement of Organization,* Immigration and Naturalization Service, Sections 1.19 and 1.36, 17 F. R. 11,613. Moreover, the entry of an order restraining the District Director from detaining the appellants for further inquiry would only postpone the test of their right to enter. If they proceeded to enter under the protection of such an order, they would immediately be subject to a deportation proceeding either in the District where they entered or any other where they might be found. The first ground set forth for the deportation of an alien is that he "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry." Section 241 (a) (1), Immigration and Nationality Act of 1952, 8 U. S. C. A. 1251 (a) (1). It is

[11] The record does not indicate what kind of determination has been made. It merely states that "respondent has concluded" that certain aliens "will be subject to" exclusion (R. 2–3, Fact VIII). Cf. R. 5, referring to newspaper article and press release. *Hearst Radio, Inc.* v. *Federal Communications Commission*, 167 F. 2d 225 (C. A. D. C.) See note 10, *supra*, p. 31.

perfectly clear, therefore, that an order addressed to the District Director alone would be ineffective in protecting any interest the alien might have in establishing his rights to enter or remain in the United States.

The lower federal courts have been virtually unanimous in concluding that the Attorney General, or the Commissioner of Immigration and Naturalization, is an indispensable party to an injunction suit or declaratory judgment proceeding challenging the exclusion or deportation of aliens.[12] One of the most carefully reasoned opinions is *Paolo* v. *Garfinkel,* 200 F. 2d 280 (C. A. 3). There the action was brought against an officer in charge to review a deportation order. It was dismissed on the ground that the Commissioner of Immigration and Naturalization was an indispensable party and can be sued only in the District of Columbia. After referring to *Williams* v. *Fanning,* the Court stated, at pp. 281–282:

> Suppose that court, after reviewing the record, decided that the petitioner, Joao Paolo, should not be deported. The court could give an order which would release Mr. Paolo from the custody of Mr. Garfinkel. Suppose that the petitioner then went to another district and was there

[12] This situation is to be distinguished from that prevailing in a petition for *habeas corpus*, which under familiar principles tests the legality of detention and is brought against the custodian, usually the District Director. See *Ahrens* v. *Clark*, 335 U. S. 188; *Shaughnessy* v. *Mezei*, 345 U. S. 206.

> taken into custody by an officer with similar duties, for his geographical area, as those performed by Mr. Garfinkel. An order against Mr. Garfinkel's doing anything to send the petitioner out of the country runs against him, but we have no reason for thinking it would run against the person having similar duties in some other district. What Mr. Garfinkel does in the Western District of Pennsylvania is to carry out the orders of the Commissioner of Immigration and Naturalization whose official home is Washington, D. C. Unless that officer is brought into the litigation and an order made against him we do not see that the petitioner is going to profit much from an order issued against a district official only.

Among the other authorities which support the same conclusion are *Corona* v. *Landon,* 111 F. Supp. 191 (S. D. Cal.); *Chavez* v. *McGranery,* 108 F. Supp. 255 (S. D. Cal.); *Birns* v. *Commissioner,* 103 F. Supp. 180 (N. D. Ohio); *Navarro* v. *Landon,* 108 F. Supp. 922 (S. D. Cal.); *Torres* v. *McGranery,* 111 F. Supp. 241 (S. D. Cal.); *Vaz* v. *Shaughnessy,* 112 F. Supp. 778 (S. D. N. Y.); *Podovinnikoff* v. *Miller,* 179 F. 2d 937 (C. A. 3). A similar conclusion is the least implicit in *Connor* v. *Miller,* 178 F. 2d 755 (C. A. 2).

Not only would a decree against the District Director be ineffective because it could not be controlling in a deportation proceeding instituted on the same grounds, but also even as to original

detention for inquiry it would be effective only in the particular district where the District Director was in charge. There is no specific reason to believe that the aliens here involved would all attempt to reenter the United States at the particular port in the particular district where this proceeding was commenced. An order in this case would not be binding on the Attorney General, the Board of Immigration Appeals, or the Commissioner of Immigration and Naturalization, who have ultimate authority to administer the immigration and nationality laws and to determine the admissibility and deportability of aliens. And it certainly would not bind any other District Director, or the employees acting under him. They would be at liberty to exclude any of the interested aliens or to institute deportation proceedings against them, even on the basis of an asserted irregular entry at Seattle. It therefore appears that under the rule stated in *Williams* v. *Fanning, supra,* this is not the type of situation in which a decree will effectively grant the desired relief by operating on the particular official before the court. Therefore, the Attorney General, or the Commissioner of Immigration and Naturalization, was an indispensable party.

D. The remedy is inappropriate

The plea to restrain enforcement of an immigration statute is virtually unprecedented. In seeking this relief appellants disregard the stat-

utory command that immigration proceedings are to be conducted by an administrative agency, functioning without judicial intervention. And they overlook the existence of habeas corpus as an exclusive remedy.

In *Heikkila* v. *Barber,* 345 U. S. 229, this court held that habeas corpus is the exclusive remedial device for judicial inquiry in deportation cases. The prevailing opinion observed, pp. 234 and 235, that the statute:

> clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution. * * * Now, as before, he may attack a deportation order only by habeas corpus.

Moreover, the Court specifically found that relief was precluded under "the general equity powers of the federal courts and the Declaratory Judgment Act." (p. 237) This holding was recently confirmed, in an exclusion case, *Tom We Shung* v. *Brownell,* No. 241, this Term, decided December 7, 1953. The issue under the 1952 Act is presently before the Court in *Brownell* v. *Rubinstein,* No. 300, this Term.

If equitable relief is precluded after the entry of a final order, no reason can be observed why it should not likewise be barred before the institution of the administrative proceeding or while it is in progress. The same considerations are controlling. Cf. *Myers* v. *Bethlehem Shipbuild-*

ing Corp., 303 U. S. 41; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540. The fundamental questions raised here could be decided in a habeas corpus proceeding. Almost without exception, the important decisions of this court regarding the proper interpretation [13] and the constitutionality [14] of immigration statutes, and the fairness of immigration procedures [15] have emerged from habeas corpus proceedings.

The relief summoned by appellants, if sanctioned by this Court, would open up opportunities for litigation delaying and defeating enforcement of the immigration laws upon claims that the statute is misconstrued or that it is unconstitutional. In providing for an expeditious immigration process, Congress sought to avert such dilatory attacks. Consequently, injunctive relief is inappropriate to question enforcement of an immigration statute, since habeas corpus affords an exclusive remedy.

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[13] *E. g.*, *Fong Haw Tan* v. *Phelan*, 333 U. S. 6; *Jordan* v. *DeGeorge*, 341 U. S. 223; *Gegiow* v. *Uhl*, 239 U. S. 3.

[14] *E. g.*, *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *The Chinese Exclusion Case*, 130 U. S. 581.

[15] *E. g.*, *Shaughnessy* v. *Mezei*, 345 U. S. 206; *Knauff* v. *Shaughnessy*, 338 U. S. 537; *The Japanese Immigrant Case*, 189 U. S. 86.

II

The statute is properly construed as applicable to an alien who seeks to return to the continental United States from a sojourn in Alaska

Assuming that the action can be deemed properly brought, the first question on the merits relates to the application of Section 212 (d) (7) to aliens who have established lawful residence in continental United States, have made a visit to Alaska and who are then returning. The view that such aliens are subject to exclusion if they fall within the classes which would originally have been excluded rests on a clear expression of congressional intent. The statute itself specifically declares in Section 212 (d) (7), 8 U. S. C. A. 1182 (d) (7), that its prohibitions "shall be applicable to *any alien* who *shall leave* Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who *seeks to enter* the continental United States or any other place under the jurisdiction of the United States." (Emphasis added.)

This language obviously is couched in unrestricted terms. Congress could have limited the thrust of this enactment to any alien resident of Alaska or any alien not returning to a residence in the United States or any alien seeking to enter continental United States through Alaska. If such a narrow orbit had been contemplated, it would have been a simple matter to chart it. But instead of limiting its compass the statute speaks

generally of "*any alien* who shall leave" Alaska and "who seeks to enter the continental United States." (Emphasis added.) This comprehensive language hardly supports a limited reading. See *Kustas* v. *Williams,* 194 F. 2d 642, 644 (C. A. 2).

Section 212 (d) (7) of the Immigration and Nationality Act of 1952 is not a departure from or radical extension of the historic policies of our immigration laws. On the contrary, it is a codification of a half century's consistent practice announced in statutory and administration directives, which have consistently regarded the insular possessions of the United States for some purposes as the equivalent of a foreign country under the immigration laws. The only important change introduced by the 1952 Act is the extension to Alaska of exclusionary mandates previously applied to all insular possessions of the United States, including Hawaii.

The first statutory recognition of this concept appeared in Section 1 of the Immigration Act of February 5, 1917, 8 U. S. C. 173, which similarly commanded that an alien leaving an insular possession of the United States would not be permitted to enter continental United States "under any other conditions than those applicable to all aliens." This language was deemed inapplicable to Alaska, which was not regarded as an insular possession within the contemplation of the 1917 statute. See *Chai* v. *Bonham,* 165 F. 2d 207 (C. A.

9). But the statute's command always was regarded as encompassing aliens who sought to come to the mainland from Hawaii, which like Alaska enjoys the highest political status among the territories of the United States.

The injunctions of the 1917 Act were consistently enforced, without any successful challenge, in regard to aliens wishing to enter the continental United States from Hawaii. Thus in *Matsuda* v. *Burnett,* 68 F. 2d 272, 273 (C. A. 9), the court found that Japanese aliens lawfully admitted to Hawaii had no right to be admitted to the mainland and stated:

> It is true that the territory of Hawaii is a part of the United States, but it is also an insular possession.

The court declared that although the statute defined Hawaii as part of the United States for some purposes, this definition did not preclude Congress from treating aliens coming from Hawaii as amenable to the restrictions of the immigration laws. To the same effect are *Sugimoto* v. *Nagle,* 38 F. 2d 207 (C. A. 9), certiorari denied, 281 U. S. 745; *Karamoto* v. *Burnett,* 68 F. 2d 278 (C. A. 9).

In the protracted deliberations which preceded the Immigration and Nationality Act of 1952, Congress had ample opportunity to reconsider the policy enunciated in Section 1 of the Immigration Act of 1917. Indeed, the original committee study

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recommended elimination of the restrictions against travel between the territories and possessions of the United States and the mainland, so that "a lawfully admitted alien resident of Hawaii, Puerto Rico, Alaska, and the Virgin Islands may travel between such places, and between such places and the mainland, the same as aliens traveling between any of our 48 States." S. Rep. 1515, 81st Cong., 2d sess., p. 674. And the original draft of the so-called Omnibus Bill (which launched the legislative process that eventually resulted in enactment of the McCarran-Walter Act) issued simultaneously with the Committee study as S. 3455, 81st Cong., 2d sess., likewise contained no restrictions upon travel between Alaska and the United States. Such restrictions, however, were added in subsequent versions of this measure. S. 716, H. R. 2379, and H. R. 2816, 82d Cong., 1st sess.

Undoubtedly, the main purpose of these provisions was to prevent excludable aliens from using entry into and residence in the territorial possessions as a means of entry into the United States.[16] The significant point, however, is that

[16] This was the stated aim of the 1917 Act. S. Rep. 352, 64th Cong., 1st sess., p. 3, commented:

"The second sentence [of section 1] is section 33, act of 1907, amended so as to make it perfectly clear that the admission of an alien to the insular possessions does not privilege such alien to come to the mainland without examination. The necessity for the provision is the fact that aliens have been using the insular territory (particularly the Phil-

it was recognized in the course of debate that these restrictions did assimilate the territorial possessions to the status of a foreign country. Delegate Farrington of Hawaii, who labored diligently to have this restriction changed or eliminated, proposed two amendments to the bill.[17] In a preliminary colloquy with Representative Jenkins, Mr. Farrington observed, 98 Cong. Rec. 4304:

> We are subject to the immigration laws in the same manner as are the States, with several exceptions. One of those exceptions is the requirement that aliens traveling from Hawaii to the mainland shall be subject to the *same restrictions as aliens traveling from a foreign country to Hawaii.* I hope to offer an amendment later to correct that, because I believe it is unnecessary and extremely unjust and imposes restrictions that are nothing more than a nuisance. [Emphasis added.]

Delegate Farrington's first amendment, which sought to grant lawful residence privileges to Filipino laborers in Hawaii, was voted down. 98 Cong.

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ippines) as a 'stepping stone' to the continent, avoiding close inspection by first securing admission to the Philippines and then coming 'coastwise' to the United States proper."

Section 33 of the 1907 Act, 34 Stat. 908, directly affected only aliens seeking to come from the Canal Zone.

[17] Similar objections were voiced by Delegate Farrington and Resident Commissioner Fernós-Isern of Puerto Rico during the final hearings on the bills. See Joint Hearings before Subcommittees on the Judiciary, 82d Cong., 1st sess., on S. 716, H. R. 2379, H. R. 2816, pp. 45–46 and 370.

Rec. 4401–4402. Thereafter Delegate Farrington offered his principal amendment, to strike from Section 212 (d) (7) the restrictions upon travel from Alaska and Hawaii. 98 Cong. Rec. 4404. While the debate referred principally to the situation in Hawaii, it manifestly is relevant also to Alaska. In support of his amendment Mr. Farrington urged that the restrictions against the travel of aliens from Hawaii to the United States had outlived their usefulness, were unnecessary, and were contrary to the national interest. *Id.* 4405–4406. The opposition was led by Representative Walter, coauthor of the bill and its principal sponsor in the House of Representatives. Representative Walter observed, *id.* 4406,

> The only question is whether or not aliens, not citizens of Hawaii, but aliens who happen to be in Hawaii, would be required to be screened before they came to the United States. What great hardship would that work on them? It is important to bear in mind the fact that there are a great many aliens in Hawaii who have never been properly screened . . . It is entirely a question of aliens coming to the United States, and I for one do not think they should be admitted *whether they come from Hawaii or whether they come from Europe, without being screened in order to determine whether or not they are subversive.* [Emphasis added.]

Delegate Farrington's amendment was voted down, *id.* 4406, and the bill ultimately was enacted without any change in the language of this subsection.[18]

Thus, the underlying concept of Section 212 (d) (7), recognized as such by Congress is that, for the purposes of entry into the United States by aliens, the territorial possessions are different from the continental United States and in status like that of a foreign country.

Some have continued to urge that the restrictions upon travel between Alaska and continental United States be eliminated.[19] Indeed, bills to remove this barrier have been introduced in Congress. H. R. 370, S. 952, 83d Cong., 1st Sess. But we believe the legislative policy is explicitly

[18] S. Rep. 1137, 82d Cong., 2d sess., accompanying the final version of the bill, declares, at p. 14:

"Section 212 (d) (7) of the bill continues in effect the special procedures applicable to aliens *who travel from* the Canal Zone, Territories, or outlying possessions to the continental United States or any other territory under the jurisdiction of the United States. Under the bill such procedures will also be applicable to aliens *traveling from Alaska to continental United States.* The requirements of the act of March 24, 1934, as amended (48 Stat. 456), relating to the documentation of certain natives of the Philippine Islands previously admitted to Hawaii are continued in effect." (Emphasis added.)

Substantially the same statement appears in H. Rep. 1365, 82d Cong., 2d Sess., p. 53.

[19] See *Report of the President's Commission on Immigration and Naturalization* (1953) pp. 183–184; *Hearings before the President's Commission on Immigration* (Sept. and Oct. 1952), pp. 1426–1428, 1490–1493.

declared in the statute and that the appropriate forum for urging a change in that policy is in the halls of Congress and not at the bar of this court.

The imposition of restrictions on entry from Alaska is equally applicable to the situation where the alien has previously resided in continental United States, has voluntarily gone to Alaska, and then attempted to return. In the first place there is clearly no exception for this particular situation in the language of the statute. In the second place, such an application is completely consistent with the Congressional policy followed for many years of limiting an alien resident's right to reenter following a brief visit to a foreign country. Repeatedly this court has held that an alien who leaves the United States voluntarily,[20] for however brief an interval, makes an entry under the immigration laws upon his return. This principle was codified, with modifications not here relevant, in Section 101 (a) (13) of the Immigration and Nationality Act of 1952, 8 U. S. C. A. 1101 (a) (13).[21] Moreover, the leading decisions dealing with reentries emphatically dismiss the supposition that a resident alien who leaves the shores of the United States can insist on readmission when he returns. *The Chinese Exclusion Case,* 130 U. S. 581; *Lem Moon Sing* v. *United States,*

[20] An involuntary, unanticipated departure does not result in a new entry upon return to the United States. *Delgadillo* v. *Carmichael,* 332 U. S. 388.

[21] See S. Rep. 1137, 82d Cong., 2d Sess., p. 4; H. Rep. 1365, 82d Cong., 2d Sess., p. 32.

158 U. S. 538; *Polymeris* v. *Trudell,* 284 U. S. 279; *Shaughnessy* v. *Mezei,* 345 U. S. 206.

Appellants have sought to find some comfort in *Lapina* v. *Williams,* 232 U. S. 78. But that holding summarily rejected the assertion that an alien resident of the United States has any vested right to return. For in that case the Supreme Court decided that Congress intended "to bring within the reach of the statute aliens who had previously resided in this country." 232 U. S. at 93. The Court also observed, *id.* 91, that the statute "sufficiently expressed . . . the purpose of applying its prohibition against the admission of aliens, and its mandate for their deportation, to all aliens whose history, condition or characteristics brought them within the descriptive clauses, irrespective of any qualification arising out of a previous residence or domicile in this country." Similarly, in *Lewis* v. *Frick,* 233 U. S. 291, 297, this Court held that an alien who had visited Canada briefly was subject to exclusion upon his return and that his domicile in the United States

> did not change his status so as to exempt him from the operation of the Immigration Act; * * * if he departed from the country, even for a brief space of time * * * he subjected himself to the operation of the clauses of the Act that relate to the exclusion and deportation of aliens, the same as if he had had no previous residence or domicile in this country.

Probably the leading authority is *Volpe* v. *Smith*, 289 U. S. 422. There the Court upheld a deportation order against a permanent resident of the United States who had made a short visit to Cuba and who was found to have made an entry into the United States upon his return. The Court's opinion observed, 289 U. S. at 425:

> We accept the view that the word "entry" * * * includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one * * *.

The Court brushed aside the assertion that the statute operated unfairly and stated, 289 U. S. at 425–426:

> Aliens who have committed crimes while permitted to remain here may be decidedly more objectionable than persons who have transgressed laws of another country.
>
> It may be true that if Volpe had remained within the United States, he could not have been expelled because of his conviction of crime in 1925, more than five years after his original entry; but it does not follow that after he voluntarily departed he had the right of reentry. In sufficiently plain language Congress has declared to the contrary.[22]

[22] See also *Claussen* v. *Day*, 279 U. S. 398; *Stapf* v. *Corsi*, 287 U. S. 129; *Polymeris* v. *Trudell*, 284 U. S. 279. Recent reiterations of this doctrine include *Schoeps* v. *Carmichael*, 177 F. 2d 391 (C. A. 9), certiorari denied, 339 U. S. 914; *Schlimmgen* v. *Jordan*, 164 F. 2d 633 (C. A. 7).

We believe it highly appropriate to read Section 212 (d) (7) in the light of the foregoing utterances. While the reentry doctrine concerns primarily aliens returning from a foreign port or place, it seems clear that Section 212 (d) (7) was designed to assimilate Alaska to a foreign country for the purpose of limiting admissibility to the United States. This view of the statute is consistent with the legislative policy in regard to alien residents who visit foreign territory. It is consonant also with the desire of Congress to restrict the activities and the mobility of aliens charged with subversive activities in the United States.[23] And, if any further evidence were needed, it accords with the earlier administrative reading of comparable directives of the Immigration Act of 1917. *Matter of O'D.*, 3 I & N Dec. 632 (1949),[24] where it was held that a resident alien who had fled to Puerto Rico and returned

[23] See *Carlson* v. *Landon*, 342 U. S. 524.

[24] Mention should be made of the statement in S. Rep. 1515, 81st Cong., 2d Sess., p. 658, where the committee in reviewing the previous law stated: "Alien residents of the continental United States are not subject to the exclusion provisions of the act of 1917 when traveling from the continental United States to any of our insular possessions and return." This statement finds no support in any statute, administrative construction, or decision, and appears to be erroneous. Moreover, this observation related to the first draft of the socalled Omnibus Bill, which proposed to end the restrictions upon travel from territories to the continental United States. As we have pointed out (p. 44) this proposal subsequently was discarded and the committee thereafter adopted the formulation which now appears in the statute.

had made an entry into the continental United States on his return.

The arguments marshalled to confront this clear legislative purpose to treat the outlying territories as equivalent to a foreign country seem quite insubstantial. In the first place, it is said that Congress defined Alaska as part of the United States for the purposes of the immigration laws. See Sec. 101 (a) (38) Immigration and Nationality Act of 1952, 8 U. S. C. A. 1101 (a) (38). But Congress itself fashioned the definition and retained the power to modify it. The definition itself relates "except as otherwise specifically herein provided." And Section 212 (d) (7), in our view, manifestly provides otherwise, by directing, in effect, that for the purposes of that subsection Alaska is to be regarded as equivalent to a foreign country.

The same considerations apply to the definition of "entry" in Sec. 101 (a) (13) of the Immigration and Nationality Act. This definition states the general rule that entry ordinarily is accomplished by coming from a foreign port or place. But in unmistakable language Congress has modified this definition in Sec. 212 (d) (7), which declares that its commands relate to aliens who leave Alaska and seek to enter continental United States.

It is said also that it was intended to limit the impact of Section 212 (d) (7) to aliens who previously had not satisfied the requirements of

the immigration laws. But this argument overlooks the fact that at least since 1924 aliens entering Alaska have had to meet every qualification demanded by the immigration laws. Section 13 (a) and 28 (a), Immigration Act of 1924, 8 U. S. C. 213 (a) and 224 (a). Under the comprehensive language of Section 212 (d) (7), it is obvious that even if an alien was lawfully admitted to Alaska, he nevertheless must undergo an additional screening if he seeks to enter continental United States. Therefore appellants cannot support their theory that the statute was intended to have the limited application for which they argue.

Appellants also contend that the exclusion provisions apply only to immigrants and that they are no longer immigrants, since they already have been lawfully admitted for permanent residence. This contention overlooks not only the explicit directives of the statute itself, but the entire course of antecedent legislative policy. See p. 48, *supra*. The introductory language of Section 212 of the Immigration and Nationality Act, 8 U. S. C. A. 1182 stipulates that its exclusions attach to "aliens". Section 212 (d) (7) likewise refers to the exclusion of "any alien" and does not state that its restrictions are limited to alien immigrants. Moreover, even if the impact of the statute were regarded as limited to immigrants, the statute itself defines an immigrant as "every alien" except those specifically excepted, and de-

cribes nonquota *immigrants* as including resident aliens returning from a temporary visit abroad. Section 101 (a) (15) and (27), Immigration and Nationality Act, 8 U. S. C. A. 1101 (a) (15) and (27). Thus, appellants hardly can escape the reach of the statute whether they are regarded as immigrants or nonimmigrants. See *Volpe* v. *Smith,* 289 U. S. 422; *Lapina* v. *Williams,* 232 U. S. 78; *Lewis* v. *Frick,* 233 U. S. 291.

It is said that Congress could not have intended to bar the travel of an alien resident from one part of the United States to another, since such a person is not actually leaving the United States. This hypothesis is rejected by the directives of the statute itself. For even if Alaska is regarded as a part of the United States for some purposes under the immigration laws, Section 212 (d) (7) nevertheless is explicit in commanding that the exclusions of those laws shall apply to persons in that part of the United States who wish to travel to the mainland. Certainly, even appellants must admit that objectionable aliens residing in Alaska may be barred from continental United States even though it can be said that they are merely traveling from one part of the "United States" to another.[25]

In the face of the explicit language of the statute, it seems idle to conjecture about the legislative purpose. But, as we have pointed out, the

[25] For varying usages of the term "United States" see pp. 67–68.

objective of Section 212 (d) (7), manifestly is to halt the spread of subversion and the opportunities for espionage. See *Carlson* v. *Landon*, 342 U. S. 524, 535–6.[26] To paraphrase the language of this court in the *Volpe* decision, Congress deemed that aliens who have been guilty of subversion or criminal activities within the United States may be more objectionable than aliens who have offended the laws of another country.[27] Congress evidently wished to limit the mobility of such individuals and their capacity for harming the United States.

Congress was doubtless aware of the close proximity of Alaska to Soviet Siberia and the difficulty of maintaining adequate controls in the vast, sparsely-populated expanses of the Alaska outpost and its adjacent islands. Moreover, Congress undoubtedly did not regard travel from Alaska as comparable to travel within continental United States, since an alien coming from Alaska must traverse hundreds—perhaps thousands—of miles

[26] In enumerating the "basic and significant changes" accomplished by the Immigration and Nationality Act of 1952, the House Committee stated that the bill "Provides for a more thorough screening of aliens, especially of security risks and subversives." H. Rep. 1365, 82d Cong., 2d Sess., p. 28.

[27] The subversive alien, unlike one who engages in criminal activities, is deportable for obnoxious activities in the United States, without time limitation. See *Harisiades* v. *Shaughnessy*, 342 U. S. 580. Sec. 241 (a) (6) and (7), Immigration and Nationality Act of 1952, 8 U. S. C. A. 1251 (a) (6) and (7).

of ocean or airspace which are not within the territorial confines of the United States.[28]

The supposition that the restrictions of Section 212 (d) (7) were not intended to apply to aliens returning from Alaska to a residence in the United States thus is unsupported by anything in the statute itself or in the contemporaneous expressions of Congress. It stems only from a hypothetic legislative policy which would be pleasing to appellants and which they are urging this Court to read into the law. But Congress inscribed no such limitation in the statute. And we cannot perceive any reasonable basis for departing from the normal, unambiguous meaning of the language used by Congress and embarking on a speculative effort to find another reading, not articulated in the statute and not supported by any indicia of legislative design.

The reliance of appellants on *Chew* v. *Colding*, 344 U. S. 590 likewise seems unpersuasive. That decision did not doubt the power of Congress to prescribe for the exclusion of alien residents who left the continental United States. On the

[28] According to the *World Almanac* (1953), p. 118, airline travel from Juneau, Alaska, to Seattle, Washington, traverses 870 miles and to San Francisco, California, 1530 miles. According to the same source, p. 466, the distances in nautical miles of a voyage between San Francisco, California, and various ports in Alaska are as follows: Anchorage, 1872; Dutch Harbor, 2051; Kiska, 2629; Kodiak, 1693; Nome, 2531; Sitka, 1302.

contrary, the Court merely concluded that under the factual circumstances of that case Congress could not have intended to deny Chew a hearing when he sought to return to the United States. Appellants do not refer to the subsequent decision of this Court in *Shaughnessy* v. *Mezei*, 345 U. S. 206, which described the limited reach of the *Chew* decision. In the *Mezei* case the Court carefully pointed out that "For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws." 345 U. S. at 213.[29]

[29] A question may perhaps arise as to how an order of exclusion would be accomplished. The last sentence of Sec. 212 (d) (7) states that the excluded alien "shall be immediately deported in the manner provided by section 237 (a) of this Act". Sec. 237 (a), 8 U. S. C. A. 1227 (a), specifies that an excluded alien shall be "deported to the country whence he came". This does not mean he would be deported to Alaska. "Country whence he came" is a term of art, previously used also in relation to the deportation of expelled aliens. See *Mensevich* v. *Tod*, 264 U. S. 134. It necessarily contemplates deportation to a foreign country. *Gagliardo* v. *Karnuth*, 156 F. 2d 867 (C. A. 2). And it refers to the country of nativity, unless the alien after birth acquired a domicile in another foreign country. *Schenck* v. *Ward*, 80 F. 2d 422 (C. A. 1); *Di Paola* v. *Reimer*, 102 F. 2d 40 (C. A. 2). And in the instant case it would envisage deportation to the country of nativity or nationality. *Karamoto* v. *Burnett*, 68 F. 2d 278 (C. A. 9).

III

The statute is constitutional

A. Appellants have no vested right to remain in the United States

Petitioners argue that Congress has no constitutional right to treat as an entering alien one who, after acquiring residence here, journeys to Alaska and returns. Their principal challenge appears to be bottomed on the premise that they will be denied substantive due process of law if the immigration restrictions interfere with their acceptance of employment or with the resumption of a residence in continental United States.[20] This argument, however, ignores principles established by this Court in an unbroken chain of decisions from the *Chinese Exclusion Case,* 130 U. S. 581, and *Fong Yue Ting* v. *United States,* 149 U. S. 698, through *Shaughnessy* v. *Mezei,* 345 U. S. 206.

It cannot tenably be asserted, at this late date, that an alien has inherent rights which can vanquish the paramount power of Congress to inhibit his entry or to cut short his stay in the

[20] It is also suggested that appellants would have less procedural rights because they would be subject to the exclusion process upon their return from Alaska. But the agreed findings in the pretrial order establish, for the purposes of this case, that the affected aliens would be entitled to a full hearing, with opportunity for administrative and judicial review, before they could be excluded on their return (R. 9–10). If they are denied any process to which they are entitled the avenue to redress in the courts will always be open. See *Chew* v. *Colding,* 344 U. S. 590.

United States. On the contrary, a unanimous array of pronouncements has found that Congress has unqualified authority, as an incident of sovereignty, to specify which aliens shall enter the United States and which shall be allowed to remain. Moreover, this court invariably has insisted that such power is political in nature, touching the conduct of international affairs and national defense, and is immune from challenge in the courts. And it has always been held that a resident alien cannot demand a right to remain in the United States, if Congress in the exercise of its plenary power commands that he be excluded or expelled.[31]

1. It is clear, therefore, that admission for permanent residence confers no vested right to remain in this country. Thus a majority of this Court, recently turned down a contention that "admission for permanent residence confers a 'vested right' on the alien * * * to remain within the country." *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 584. In the prevailing opinion, Justice Jackson observed, 342 U. S. at 586, 587–589, 591:

> Under our law, the alien in several respects stands on an equal footing with citi-

[31] The argument that the authority to regulate immigration is limited to the commerce power hardly can be supported. On the contrary, every holding of this Court, commencing with *The Chinese Exclusion Case, supra,* has insisted that it springs from national sovereignty and relates to the conduct of international affairs and national defense.

zens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.

* * * * *

That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.

* * * * *

It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

* * * * *

We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation.

Justice Frankfurter's concurring opinion similarly commented, 342 U. S. at 596–597:

> The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.

The same concepts were underscored the same day in *Carlson* v. *Landon,* 342 U. S. 524, 534. Moreover, this doctrine can be buttressed by many declarations of this court, voiced by some of its most celebrated members. Since the question has been so recently reexamined, we refer additionally only to the observations of Justice Gray in *Fong Yue Ting* v. *United States,* 149 U. S. 698, 711:

> The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare * * *

Justice Gray also pointed out that aliens residing in the United States:

> are entitled, so long as they are permitted by the government of the United States

> to remain in the country, to the safeguards of the Constitution, and the protection of the laws, in regard to their rights of person and property, and to their civil and criminal responsibility. But they continue to be aliens, * * * and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest.

And Judge Learned Hand recently described this concept with characteristic incisiveness in *Kaloudis* v. *Shaughnessy,* 180 F. 2d 489, 490 (C. A. 2):

> The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate.

2. The same considerations apply *a fortiori* to an alien who seeks admittance to the United States. Though some members of this court have questioned whether the power of expulsion is unlimited, no one ever has doubted the absolute right of Congress to define the classes of aliens whose entry into the United States will be precluded. As this Court stated in *Knauff* v. *Shaughnessy,* 338 U. S. 537, 542:

> At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe.

The unrestricted authority of Congress to bar aliens applying for entry likewise was endorsed in *Shaughnessy* v. *Mezei,* 345 U. S. 206, 210. Moreover, in dissenting on other grounds, Justice Jackson stated, 345 U. S. at 222–233:

> Due process does not invest any alien with a right to enter the United States, nor confer on those admitted the right to remain against the national will.

3. It is true that so long as an alien is permitted to remain in the United States he is protected against unfair impairments of his employment opportunities. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Truax* v. *Raich,* 239 U. S. 33; *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410. But, as pointed out by Justice Jackson in the *Harisiades* case and by Justice Gray in *Fong Yue Ting* v. *United States,* these limited protections depend on continuance of his residence privileges in the United States and are subordinate to the sovereign power of Congress to withdraw such privileges at any time. Moreover, the immigration statute is not aimed, directly or indirectly, at any right or status of employment. Any im-

pact on such employment opportunities is fortuitous and results from the happenstance that the prospective employee chances to be an alien. The execution of the immigration laws frequently curtails an alien's opportunities to accept employment in the United States. But the Constitution never has been regarded as affording protection against such a remote consequence of the exertion of sovereign power. See *American Communications Assn.* v. *Douds,* 339 U. S. 382, 390, 391, 404, 405, 409; *Hamilton* v. *Board of Regents,* 293 U. S. 245; *Korematsu* v. *United States,* 323 U. S. 214.

4. Nor can appellants claim any advantage because they wish to return to a permanent residence in the United States following a temporary absence. As we have pointed out, many decisions of this court have held that an alien resident of the United States cannot demand a right to be readmitted to this country following a voluntary sojourn in a foreign country, no matter for how brief a period. In each of these holdings this court emphasized that the sweep of Congressional authority to control the entry and residence of aliens was extensive enough to include measures directed against returning resident aliens. We refer again to *Volpe* v. *Smith,* 289 U. S. 422, 425; *Lem Moon Sing* v. *United States,* 158 U. S. 538; and *Lapina* v. *Williams,* 232 U. S. 78, 88. In the *Lapina* case the Court stated:

> The authority of Congress over the general subject-matter is plenary; it may ex-

> clude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country. [Citing cases.]
>
> The question, therefore, is not the power of Congress, but its intent and purpose as expressed in legislation.

That returning lawful residents can be excluded by Congress was recently emphasized again by this Court in *Shaughnessy* v. *Mezei,* 345 U. S. 206, 213, where Justice Clark stated:

> For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws.

See also *The Chinese Exclusion Case,* 130 U. S. 581; *Polymeris* v. *Trudell,* 284 U. S. 279, 281.

It is thus established that the power to limit the entrance and residence of aliens is an attribute of sovereignty, essential to the national welfare and safety, and that even a resident alien cannot defeat the exercise of this plenary power by urging that he has a vested right to reenter or to remain in the United States. Since the power of Congress over the admittance and sojourn of aliens is so complete that it can bar reentry of an alien resident seeking to return from a temporary visit abroad (p. 64) and can require the expulsion of a long-time resident alien who has never left this country (p. 59), it is complete enough to per-

mit Congress to treat a journey to Alaska as a departure from the United States and a return from that journey as an entry into the United States. This is a lesser limitation of residence privileges and necessarily must be included in the fullness of Congressional power in this area.

B. Congress has the power to treat a voyage to Alaska as equivalent to departure for a foreign country for the purposes of entry into continental United States

It thus seems manifest that a resident alien cannot defeat the exercise of the plenary power to limit the entrance and residence of aliens by urging that he has a vested right to reenter or to remain in the United States. On what basis, then, can appellants summon the aid of the Constitution? Apparently their plea is rooted in a feeling that the establishment of impediments to travel of aliens between a territory of the United States and the mainland somehow violates some precept of the Constitution.

We have pointed out that restrictions against admittance from other territories of the United States have been in force for over fifty years. This circumstance alone argues weightily against a charge of unconstitutionality. *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 315. We mention also the deference due a solemn expression of the federal legislative process, and the reluctance of this Court to override it in the absence of the plainest showing of unconstitutionality. *American Communications Assn.* v.

Douds, 339 U. S. 382; *Harisiades* v. *Shaughnessy,* 342 U. S. 580. We note too the absence of any direct or indirect restraint in the Constitution itself. These are time tested aids in appraising a statute and each of them tips the scale against appellants.

Appellants' argument is, in essence, that Congress has no power to consider Alaska as different from a state of the United States and therefore cannot treat a voyage as a departure from the United States and an entry therefrom as a new entry into the United States. Alaska, is, however, not a state of the United States; it is an organized territory of the United States. *Binns* v. *United States,* 194 U. S. 486, 491. And Alaska is not a part of the continental United States, but separated from it by a large expanse of land or water. These two factors, singly and together, establish that Alaska may be treated differently from the states of the United States for many purposes, including departure and entry under the immigration laws.

Viewed against the backdrop of our national domain, it is manifest, of course, that Alaska is not foreign territory. *American Railroad Co.* v. *Didricksen,* 227 U. S. 145; *DeLima* v. *Bidwell,* 182 U. S. 1. But this does not mean that it must be regarded as part of the United States for every purpose. It is well known that the term "United States" may have varying connotations. Thus in some usages it may describe the

sovereign power of our nation, in others it "may designate the territory over which the sovereignty of the United States extends, or it may be the collective name of the states which are united by and under the Constitution." *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 671–2. See 1 Willoughby, *Constitutional Law* (2d Ed., 1929), 475; Langdell, *The Status of Our New Territories,* 12 Harv. L. R. 365 (1899). Whether Alaska is to be regarded as part of the United States within the contemplation of a statute or of the Constitution depends on the context. Cf. *Mullaney* v. *Anderson,* 342 U. S. 415; *Alaska* v. *Troy,* 258 U. S. 101.

In the *Insular Cases* and in subsequent decisions this Court has evolved practical formulas for assessing the status of the inhabitants of our noncontiguous possessions. See 1 Willoughby, *Constitutional Law,* 479 *et seq.; Alaska and Hawaii: From Territoriality to Statehood,* 38 Cal. L. R. 273 (1950); Irion, *Areas Under the Jurisdiction of the United States,* 17 George Wash. L. R. 301 (1949). An important facet of these territorial doctrines is that insofar as the Constitution safeguards the "fundamental rights of the individual", and thus inhibits any action by federal officers, it applies in the United States and all its territories, whether incorporated or unincorporated. *Farrington* v. *Tokushige,* 273 U. S. 284, 299; *Hawaii* v. *Mankichi,* 190 U. S. 197, 218; *Duncan* v. *Kahanamoku,* 327 U. S. 304; *Kepner* v.

United States, 195 U. S. 100; *Soto* v. *United States,* 273 Fed. 628 (C. A. 3). But we are not aware of any "fundamental" right assuring to aliens in Alaska unlimited access to continental United States. On the contrary, as we have pointed out, the entire course of American constitutional doctrine negates the existence of any such absolute right of entry or residence.

Moreover, we know of no constitutional prohibition circumscribing the authority of Congress to impose restrictions on the travel of aliens between a noncontiguous territory and the mainland. Indeed, the only provision of the Constitution in which territories are mentioned is Article IV, Section 3, Clause 2, which specifies:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

From the breadth of this language, it seems overwhelmingly evident that the Framers intended to bestow upon Congress complete power to legislate [32] for the territories.[33] And this Court fre-

[32] The constitutional reference to making regulations patently includes laws. *Dorr* v. *United States,* 195 U. S. 138, 146.

[33] Among the supporting evidence is the fact that the Commerce Clause, Art. I, Sec. 8, Cl. 3, confers authority on Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," but does not mention commerce with territories. The obvious implication is that complete power is given in the Territorial Clause.

quently has characterized such legislative power over the territories as plenary.

That Congress has ample authority to make special dispensations for commerce and travel to and from Alaska is the direct holding of *Alaska* v. *Troy*, 258 U. S. 101. There a statute giving preference to the ports of the states over those of Alaska was attacked "upon the ground that the regulation of commerce prescribed therein gives a preference to ports of the Pacific Coast States over those of Alaska, contrary to Sec. 9, Art. I, Federal Constitution—'No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another'." 258 U. S. at 109. The challenge was rejected unanimously, and the Court stated, 258 U. S. at 111:

> The appellants insist that "State" in the preference clause includes an incorporated and organized territory. This word appears very often in the Constitution and as generally used therein clearly excludes a "Territory". To justify the broad meaning now suggested would require considerations more cogent than any which have been suggested. *Obviously, the best interests of a detached territory may often demand that its ports be treated very differently from those within the States.* And we can find nothing in the Constitution itself or its history which compels the conclusion that

> it was intended to deprive Congress of power so to act. [Emphasis added.]

Also significant is *Binns* v. *United States,* 194 U. S. 486, 491. In that case a license tax applicable only to Alaska was upheld. The Court found the constitutional provision for uniformity of taxes throughout the United States not applicable to Alaska, and observed:

> Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution * * *

In *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, a tax law applicable specially to the Philippine Islands was sustained. The Court found that even if a like tax applicable to a state would be invalid it does not follow "that such a tax for the uses of a territory or dependency would likewise be invalid. A state, except as the Federal Constitution otherwise requires, is supreme and independent". 301 U. S. at 317. The Court then declared, *id.* 323:

> In dealing with the territories, possessions and dependencies of the United States, this nation has all the powers of other sovereign nations, and Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union."

And in *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, the Court upheld the propriety of a tax imposed by a state upon imports from the Philippine Islands and found that under certain circumstances it was entirely proper to regard territory of the United States as equivalent to a foreign country. Again the Court pointed out, 324 U. S. at 674, that in legislating for the territories,

> Congress is not subject to the same constitutional limitations, as when it is legislating for the United States.

See also *Inter-Island Steam Nav. Co.* v. *Hawaii,* 305 U. S. 306; *Downes* v. *Bidwell,* 182 U. S. 244.

These authorities establish decisively, we believe, that complete power resides in Congress to deal specially with travel and commerce from Alaska.[34]

Moreover, the special situation of a noncontiguous territory like Alaska generates an additional source of legislative power. For in journeying from Alaska an alien must leave the territorial limits of the United States. Since he thereafter seeks to enter from outside the United States we believe his situation clearly falls within the zone of sovereign legislative power to restrict entries from outside the United States. The

[34] In addition to the examples cited in the above cases, there have been a number of other instances, outside of immigration laws, of special legislative dispensations in regard to Alaska. See comment, *Alaska and Hawaii: From Territorality to Statehood*, 38 Cal. L. R. 273, 282 (1950); Act of April 29, 1902, 32 Stat. 172; cf. 48 U. S. C. 1486.

enactment of Section 212 (d) (7) was therefore fully within the competence of Congress.

Even if we were to assume that power to deal with travel to a territory of the United States is subject to the due process clause it seems to us that there clearly is a reasonable basis for treating Alaska and other noncontiguous territory as different from the continental United States for the purposes of the immigration laws. In enacting this statute Congress doubtless took into account the special problems posed by Alaska's size, its scant population, its proximity to Soviet Siberia, the difficulty of establishing adequate controls to prevent the movement of spies, saboteurs and subversives, the distances to be traversed across foreign territory and waters in traveling from Alaska to continental United States, and the need for providing a screening process at the ports of entry in the United States in order to close an avenue affording the possibility of easy entrance for subversives and other undesirables.[35]

Even citizens of the United States cannot claim an unlimited right of free movement which can nullify precautionary measures adopted by the federal government in fulfilling legitimate national needs. Thus, quarantine laws safeguarding the public health are an obvious example of

[35] See H. Rep. 675, 83rd Cong., 1st Sess., pp. 6, 14, which refers to the fact that from Alaska, "Across a narrow strip of water, Siberia can be seen with the naked eye."

legislation properly restricting free movement.[36] Another example is the selective service legislation enacted during time of war or danger.[37] Also sustained have been extreme measures limiting the mobility of West Coast residents of Japanese ancestry, citizens and aliens, under wartime conditions of peril.[38] Federal mandates for the registration of aliens likewise are valid,[39] as are summary procedures for the internment and removal of alien enemies.[40] Additional restrictions limit the movement of alien enemies during wartime,[41] and other edicts sanction restricted mobility of citizens and aliens during time of war or national emergency.[42]

These examples are displayed merely to illustrate the wide expanse of federal power. They demonstrate decisively, we believe, that under exigent circumstances, arising out of a national

[36] *Thornton* v. *United States*, 271 U. S. 414; *Mintz* v. *Baldwin*, 289 U. S. 346; *Compagnie Francaise* v. *Louisiana State Board of Health*, 186 U. S. 380.

[37] *Selective Draft Law Cases*, 245 U. S. 366; *United States* v. *Henderson*, 180 F. 2d 711 (C. A. 7), certiorari denied, 339 U. S. 963.

[38] *Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214.

[39] *Hines* v. *Davidowitz*, 312 U. S. 52; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *United States* v. *Franklin*, 188 F. 2d 182 (C. A. 7); *Gancy* v. *United States*, 149 F. 2d 788 (C. A. 8), certiorari denied, 326 U. S. 767.

[40] *Ludecke* v. *Watkins*, 335 U. S. 160.

[41] Presidential Proclamations 2525, 2526, 2527, 2537, and 2563, 6 F. R. 6321, 6323, 6324, 7 F. R. 329, 5535.

[42] Presidential Proclamations 2523, 6 F. R. 5821, and 3004, 18 F. R. 489.

need, even some restrictions upon travel between states might well be deemed justified. But this question is not now before the Court. In view of the plenary power of Congress over the territories, and its unqualified power to regulate the entry and expulsion of aliens, Congress clearly has the power to determine that a voyage to Alaska shall be deemed a departure from the United States for the purposes of the immigration laws.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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DECEMBER 1953.

APPENDIX

[Air Mail]

DECEMBER 17, 1953.

Commissioner, Central Office, Washington, D. C.
John P. Boyd, District Director,
Seattle, Washington.

Alien Alaska arrivals.

(Attention: Mr. L. Paul Winings, General Counsel.)

With reference to your telegram of December 14, 1953, the following information is forwarded:

The total number of aliens returning from Alaska during the period July 1–November 1, 1953, is estimated to be 3,131. This estimate is based on an actual manifest count of the September 1953 Alaskan alien arrivals. No alien was excluded without a hearing. Thirty-four cases were held upon arrival from Alaska for possible exclusion during the period July 1–November 1, 1953. Of this number 12 were released following a secondary examination, 15 were referred to Special Inquiry Officer, and 7 were referred to Investigation Section for Warrant proceedings. Of this last group the following disposition has been made: (1) one seaman and a citizen of Lithuania was ordered deported and is presently paroled under bond awaiting procurement of a travel document; (2) one, a citizen of Poland, was ordered deported and is presently paroled awaiting travel documents; (3) one was granted a stay of deportation pending presiden-

tial action on a pardon; (4) one was appealed to the B. I. A. and is still pending; (5) one was allowed voluntary departure and granted permission to reapply after deportation; (6) one was placed under a warrant of arrest, given a hearing and allowed to apply for discretionary action under Section 212 (c) of the Immigration and Nationality Act, action upon which is still pending; and (7) one was paroled and warrant of arrest served November 13, 1953. Parole was continued and he is scheduled for a hearing December 22, 1953.

Of those referred to the Special Inquiry Officer, six were admitted under waivers of inadmissibility and their cases certified to the B. I. A. for approval as required by OI 236.14 I (three have been sustained and three are still pending), two were excluded as aliens convicted of crimes involving moral turpitude, to wit, burglary and grand larceny, and 7 cases are still pending awaiting completion of investigation required before action can be taken on application for waiver of inadmissibility.

Of the 19 cases held for warrant proceedings or Special Inquiry hearings, 9 were paroled under bond and the remaining number were paroled without bond.

No record is kept of the union affiliation of various Alaskan alien or citizen arrivals returning from cannery work. Of those detained at Seattle, 12 aliens were known to be members of the ILWU and one was a member of the Alaska Fish Cannery Workers' Union, an affiliate of the AFL. The ILWU secured the services of a local lawyer for any of their members who were de-

tained and in this way the membership in that particular union was brought to the attention of this office.

Basis of action in all of the cases detained for Special Inquiry Officer hearings was their conviction for crimes involving moral turpitude (Section 212 (a) (9) of the Immigration and Nationality Act).

U. S. GOVERNMENT PRINTING OFFICE: 1953

SUPREME COURT OF THE UNITED STATES

No. 195.—October Term, 1953.

International Longshoremen's and Warehousemen's Union, Local 37, et al., Appellants, *v.* John P. Boyd, District Director, Immigration and Naturalization Service.	On Appeal From the United States District Court for the Western District of Washington.

[March 8, 1954.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an action by Local 37 of the International Longshoremen's and Warehousemen's Union and several of its alien members to enjoin the District Director of Immigration and Naturalization at Seattle from so construing § 212 (d)(7) of the Immigration and Nationality Act of 1952* as to treat aliens domiciled in the continental United States returning from temporary work in Alaska as if they were aliens entering the United States for the first time. Declaratory relief to the same effect is also sought. Since petitioners asserted in the alternative that such a construction of the challenged statute would be unconstitutional, a three-judge district court was convened. The case came before it on stipulated facts and issues of law, from which it appeared that the union has over three thousand members who work every summer in the herring and salmon canneries of Alaska, that some of these are aliens, and that if alien workers going

*This section states that the exclusionary provisions of § 212 (a) shall, with exceptions not here relevant, "be applicable to any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States . . . ." 8 U. S. C. § 1182 (d)(7).

to Alaska for the 1953 canning season were excluded on their return, their "contract and property rights [would] be jeopardized and forfeited." The District Court entertained the suit but dismissed it on the merits. 111 F. Supp. 802. In our order of October 12, 1953, we postponed the question of jurisdiction to a hearing on the merits. 346 U. S. 804.

On this appeal, appellee contends that the District Court should not have reached the statutory and constitutional questions—that it should have dismissed the suit for want of a "case or controversy," for lack of standing on the union's part to bring this action, because the Attorney General was an indispensable party, and because habeas corpus is the exclusive method for judicial inquiry in deportation cases. Since the first objection is conclusive, there is an end of the matter.

Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise. That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function. *United Public Workers* v. *Mitchell*, 330 U. S. 75; see *Muskrat* v. *United States*, 219 U. S. 346, and *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450. Since we do not have on the record before us a controversy appropriate for adjudication, the judgment of the District Court must be vacated, with directions to dismiss the complaint.

It is so ordered.

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Mr. Justice Black, with whom Mr. Justice Douglas concurs, dissenting.

This looks to me like the very kind of "case or controversy" courts should decide. With the abstract principles of law relied on by the majority for dismissing the case, I am not in disagreement. Of course federal courts do not pass on the meaning or constitutionality of statutes as they might be thought to govern mere "hypothetical situations. . . ." Nor should courts entertain such statutory challenges on behalf of persons upon whom adverse statutory effects are "too remote and abstract an inquiry for the proper exercise of the judicial function." But as I read the record it shows that judicial action is absolutely essential to save a large group of wage earners on whose behalf this action is brought from irreparable harm due to alleged lawless enforcement of a federal statute. My view makes it necessary for me to set out the facts with a little more detail than they appear in the Court's opinion.

Every summer members of the appellant union go from the west coast of continental United States to Alaska to work in salmon and herring canneries under collective-bargaining agreements. As the 1953 canning season ap-

proached the union and its members looked forward to this Alaska employment. A troublesome question arose, however, on account of the Immigration and Nationality Act of 1952, 66 Stat. 182. Section 212 (d)(7) of this new Act has language that given one construction provides that all aliens seeking admission to continental United States from Alaska, even those previously accepted as permanent United States residents, shall be examined as if entering from a foreign country with a view to excluding them on any of the many grounds applicable to aliens generally. This new law created an acute problem for the union and its numerous members who were lawful alien residents, since aliens generally can be excluded from this country for many reasons which would not justify deporting aliens lawfully residing here. The union and its members insisted on another construction. They denied that Congress intended to require alien workers to forfeit their right to live in this country for no reason at all except that they went to Alaska, territory of the United States, to engage in lawful work under a lawfully authorized collective-bargaining contract. The defendant immigration officer announced that the union's interpretation was wrong and that workers going to Alaska would be subject to examination and exclusion. This is the controversy.

It was to test the right of the immigration officer to apply § 212 (d)(7) to make these workers subject to exclusion that this suit was filed by the union and two of its officers on behalf of themselves and all union members who are aliens and permanent residents. True, the action was begun before the union members went to Alaska for the 1953 canning season. But it is not only admitted that the Immigration official intended to enforce § 212 (d)(7) as the union and these workers feared. It is admitted here that he has since done precisely that. All 1953 alien cannery workers have actually been subjected to the weari-

some routine of immigration procedure as though they had never lived here. And some of the union members are evidently about to be denied the right ever to return to their homes on grounds that could not have been legally applied to them had they stayed in California or Washington instead of going to Alaska to work for an important American industry.

Thus the threatened injury which the Court dismisses as "remote" and "hypothetical" has come about. For going to Alaska to engage in honest employment many of these workers may lose the home this country once afforded them. This is a strange penalty to put on productive work. Maybe this is what Congress meant by passing § 212 (d)(7). And maybe in these times such a law would be held constitutional. But even so, can it be that a challenge to this law on behalf of those whom it hits the hardest is so frivolous that it should be dismissed for want of a controversy that courts should decide? Workers threatened with irreparable damages, like others, should have their cases tried.